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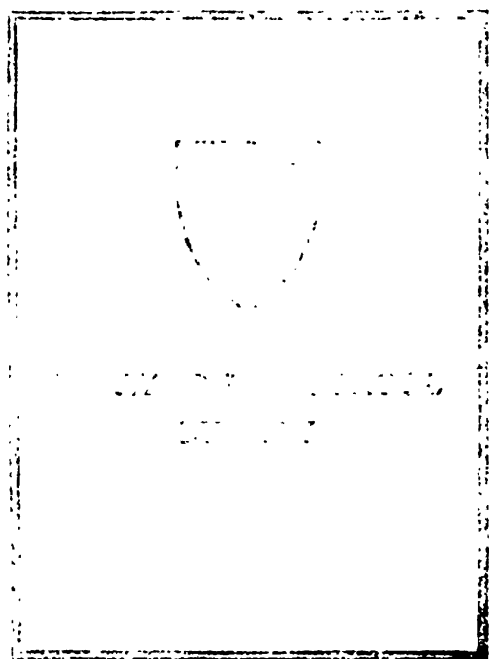
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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA

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JANUARY TERM, 1909

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BY  
W. W. CORNWALL

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VOLUME XXIV  
BEING VOLUME CXLI OF THE SERIES

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## JUDGES OF THE SUPREME COURT.

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W. D. EVANS, *Chief Justice*, Franklin County.  
HORACE E. DEEMER, *Montgomery County*.  
JOHN C. SHERWIN, *Cerro Gordo County*.  
EMLIN McCLAIN, *Johnson County*.  
SILAS M. WEAVER, *Hardin County*.  
SCOTT M. LADD, *O'Brien County*.

---

## OFFICERS OF THE COURT.

H. W. BYERS, *Attorney General*, Shelby County.  
HENRY L. BOUSQUET, *Clerk*, Marion County.  
W. W. CORNWALL, *Reporter*, Clay County.

Judge W. D. Evans became Chief Justice in January, 1909, through rotation, as the successor to Judge Chas. A. Bishop, deceased.

# JUDGES OF THE COURTS.

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

## DISTRICT COURTS.

- First District*—H. BANK, JR., Keokuk.  
*Second District*—D. M. ANDERSON, Albia; F. W. EICHELBERGER, Bloomfield; M. A. ROBERTS, Ottumwa; C. W. VERMILLION, Centerville.  
*Third District*—H. M. TOWNER, Corning; HIRAM K. EVANS, Corydon.  
*Fourth District*—DAVID MOULD, Sioux City; F. R. GAYNOR, Le Mars; J. F. OLIVER, Onawa; WILLIAM HUTCHINSON, Alton.  
*Fifth District*—J. D. GAMBLE, Knoxville; J. H. APPLGATE, Guthrie Center; EDMUND NICHOLS, Perry.  
*Sixth District*—K. E. WILLCOCKSON, Sigourney; BYRON W. PRESTON, Oskaloosa; W. G. CLEMENTS, Newton.  
*Seventh District*—ARTHUR P. BARKER, Clinton; A. J. HOUSE, Maquoketa; D. V. JACKSON, Muscatine; JAMES W. BOLLINGER, Davenport.  
*Eighth District*—RALPH P. HOWELL, Iowa City.  
*Ninth District*—JESSE A. MILLER, Des Moines; HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; JAS. A. HOWE, Des Moines.  
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*Fourteenth District*—D. F. COYLE, Humboldt; A. D. BAILIE, Storm Lake.  
*Fifteenth District*—A. B. THORNELL, Sidney; EUGENE B. WOODRUFF, Glenwood; ORVILLE D. WHEELER, Council Bluffs; W. R. GREEN, Audubon.  
*Sixteenth District*—F. M. POWERS, Carroll; J. A. CHURCH, Jefferson.  
*Seventeenth District*—C. B. BRADSHAW, Toledo; JNO. M. PARKER, Marshalltown.  
*Eighteenth District*—W. N. TREICHLER, Tipton; F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids.  
*Nineteenth District*—ROBERT BONSON, Dubuque; MATTHEW C. MATTHEWS, Dubuque.  
*Twentieth District*—JAMES D. SMYTH, Burlington; W. S. WITHEROW, Mt. Pleasant.

## SUPERIOR COURTS.

- Cedar Rapids*—JAMES H. ROTHROCK.  
*Council Bluffs*—S. B. SNYDER.  
*Keokuk*—W. L. McNAMARA.  
*Oelwein*—M. D. PORTER.  
*Grinnell*—J. P. LYMAN.  
*Perry*—JOHN SHORTLEY.  
*Shenandoah*—W. P. FERGUSON.

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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA  
AT  
DES MOINES, JANUARY TERM, 1909.

AND IN THE SIXTY-THIRD YEAR OF THE STATE.

---

JOHN O'CONNELL v. F. SMITH & SON, Appellant.

**Master and servant: FAILURE TO GUARD MACHINERY: NEGLIGENCE.** The  
1 statute requires that saws in manufacturing establishments, when  
it can be done, shall be so guarded as to prevent injury to work-  
men; and a failure to do so is negligence, irrespective of the  
question of custom. In the instant case the evidence was such as  
to show that defendant might have provided suitable protection  
by means of a board or hood.

**Same: ASSUMPTION OF RISK: CONTRIBUTORY NEGLIGENCE.** An employee  
2 operating a circular saw does not assume the risk of dangers not  
appreciated. In the instant case assumption of the risk of danger  
from flying particles of wood in the use of a circular saw, and of  
plaintiff's negligence, were for the jury.

*Appeal from Clinton District Court.*—HON. D. V. JACK-  
SON, Judge.

VOL. 141 1A—I



TUESDAY, NOVEMBER 17, 1908.

REHEARING DENIED THURSDAY, JANUARY 21, 1909.

ACTION for damages resulted in judgment against the defendant, from which it appeals.—*Affirmed.*

*Ellis & McCoy*, for appellant.

*Wolfe & Wolfe* and *C. H. George*, for appellee.

LADD, C. J.—Defendant is proprietor of a box factory in Clinton, and on June 29, 1906, plaintiff was operating a circular cross-cut saw therein, cutting rubbish for wood, when the tooth of the saw caught a block, hurling it into his eye, destroying the sight. The saw extended through a groove in the table three or four inches above. Pieces of board were placed and held with the right hand on a carriage which was pressed toward the saw with the body and left hand. The parts not used were thrown in the woodpile, and those of value put aside on the table for use. The small blocks or pieces were cleaned away in the evening. There was no shield or guard on the saw. By chapter 149, Acts 29th General Assembly (see section 4999a, Code Supp. 1907), it is provided that "in all manufacturing or other establishments where machinery is used . . . all saws . . . shall be properly guarded." The evidence tended to show that a saw could be effectually guarded by hanging a board large enough to obstruct any pieces the teeth might catch and throw over between it and the operator, or by covering with a hood or box so placed that the material to be sawed could pass underneath, and that such appliances were proper to guard against injury to the operator. This evidence was practically undisputed; the defendant proceeding on the theory

1. MASTER AND  
SERVANT: fail-  
ure to guard  
machinery:  
negligence.

that, unless saws were customarily guarded in similar factories, it could not be charged with negligence. There might be something in this position but for the enactment of the statute referred to. The Legislature evidently concluded that the necessity of a guard ought not to depend on the custom of particular factories, but on that of those using similar saws for like purposes, and, as many establishments thoughtful for the safety of their employees had found it practical to guard different instruments including saws, all establishments where machinery is used should properly guard them. The duty to guard saws, at least when practicable, is fixed by law. The only inquiry left open is whether the guard is proper. That other factories may have ignored this law furnishes no excuse to any one for not complying with its terms. The evidence left little or no doubt but that to guard this and other saws in defendant's factory was practical, that either of the appliances mentioned would have furnished adequate protection without interfering with the operation of the saws, and therefore might have been found to have been proper. It follows that in entirely omitting to provide any guard for the protection of the operator the defendant was negligent.

II. Did plaintiff assume the risk? He had been employed as a roustabout at this factory for the five years previous to the accident, and prior to that during vacations from attending school. When those regularly operating machines were away, he often took their places, and in this way he had handled temporarily the planer, the matcher, the printer, the nailer, and for a day or a half day at a time the cross-cut saw on four or five different occasions, and during the week before the accident. He had noticed the saw carry two or three little blocks over to the other side of it, but testified that he had never seen it throw any over with any degree of force, and that he was not aware of any danger to be apprehended therefrom. Another witness who had

2. SAME: assumption of risk: contributory negligence.

operated the saw several years testified that it would catch a block so as to hurl it with force only occasionally—about once a week. To do this, of course, the saw teeth must catch into the block somewhat firmly, and this would not be likely to occur frequently, so that plaintiff, though in the factory a long time, might not have appreciated the danger from this source. If he did not appreciate the danger, and the jury might so have found, then he did not assume the risk. See *Harney v. Chicago, etc., Railway Co.*, 139 Iowa, 359. Enough has been said to indicate that whether plaintiff was guilty of contributory negligence was for the jury. Several other errors are assigned and regarded as untenable, but, not being argued or noticed in the statement of propositions or points, are not reviewed.—*Affirmed.*

---

H. B. HEDGE, Appellee, v. CITY OF DES MOINES,  
Appellants.

**Municipal corporations: SPECIAL ASSESSMENTS: OBJECTIONS: EVIDENCE**

- 1 OF FILING. On appeal from the assessment of the cost of certain paving the evidence is held to show that an amendment to the original objections filed before the city council was in fact filed, although not found among the files at the time of the trial in the district court, and therefore is treated as a part of the objections duly filed.

**Same: OBJECTIONS: WAIVER.** Objections to a special assessment for

- 2 the cost of paving not filed within the time provided by Code sections 823-4, and not until after the hearing before the council cannot be considered, even though notice was given at the hearing that such objections would be filed

**Contracts for public improvement: CONFORMITY WITH PRIOR PROCEED-**

- 3 INGS. A contract entered into with the successful bidder for the construction of a public improvement must conform substantially with the terms and conditions constituting a basis for the competitive bidding; but this rule is not as generally applied where the improvement has been completed as where the right to enter into the contract is challenged at the inception of the proceedings and

before the contractor has done his work, or where there was a previous understanding with the successful bidder which was withheld from others.

**Same.** In the instant case the notice to bidders provided that the cost  
4 of the improvement should be charged to abutting property according to law, and payment in full for the work to be made in assessment certificates. The contract entered into provided that if the cost of the improvement might not lawfully be assessed against the abutting property the city would pay the same out of a special fund. *Held*, in view of the fact that no objection to the contract was made in advance of its complete performance in accordance with specifications; that the variance in the contract was of no benefit to the contractor, but rather to the city; and as it was in compliance with an ordinance protecting the city from a general liability for deficiency, and with the statute as understood by the parties, there was not such a substantial departure from the notice as to invalidate the contract.

**Same: CONTRACTS: GUARANTY PROVISIONS.** The provision in a paving  
5 contract that the contractor shall keep the improvement in repair for a series of years is not a matter of which abutting owners can complain because casting upon them a burden not authorized by the statute, as the same is essentially a guaranty of good work; and this is especially true where the objectors to the assessment in petitioning for the improvement asked that the provision be incorporated in the contract.

**Petition for public improvement: SIGNATURES BY AGENTS: AUTHORITY:**  
6 **EVIDENCE.** Where the petition for a public improvement purports to have been signed in part by the duly authorized agents of abutting owners, the city council will be presumed to have satisfied itself as to the authority of such agents before adopting the resolution of necessity; and the finding of the council makes a *prima facie* case in that respect. In the instant case the evidence of want of such authority is held insufficient to overcome the *prima facie* case made by the record of the council.

**Special assessment: BENEFITS: FRONT FOOT RULE.** Where a special  
7 assessment purports to have been made according to benefits and such is the finding of the council, this finding is not impeached by the fact that the result is the same as though the assessment had been made by the front foot rule.

**Same: BENEFITS: EVIDENCE.** In the matter of an assessment for a  
8 public improvement the evidence is held to show that abutting owners received the benefits for which they are assessed.

**Special assessments: COUNTERCLAIM FOR VALUE OF OLD IMPROVEMENT.**

- 9 Conceding that an abutting owner has a claim against a city for the value of an old pavement constructed by special assessment, which has been removed by the city, still its value cannot be set-off against an assessment payable to the contractor for constructing a new one, as the city acts in a legislative capacity in making the assessment.

**Special assessments: DIVERSION OF FUNDS.** A special assessment is  
10 a tax levied for a special purpose and is not subject to counter-claim, set off, attachment or execution.

**Special assessment: WAIVER OF IRREGULARITY.** Where special assess-  
11 ment proceedings up to the time of filing objections and the hearing thereon did not disclose a purpose to assess the abutting property in excess of the depth of one hundred and fifty feet, the irregularity in so doing was not waived by failing to make objection thereto before the council.

**Appeal: CORRECTION OF ASSESSMENT: CONFIRMATION.** Where property  
12 was illegally assessed in excess of one hundred and fifty feet, the Supreme Court on appeal, under the peculiar circumstances of the case, confirm the assessment to that extent with legal interest from the date of the original delinquency, and cancel the same as to all property in excess of one hundred and fifty feet, rather than order an entire new assessment.

*Appeal from Polk District Court.*—HON. A. H. McVey,  
Judge.

SATURDAY, JANUARY 23, 1909.

THIS is an appeal in the matter of an assessment of the cost of paving against abutting property in the city of Des Moines. From the action of the city council, the plaintiff appealed to the district court, and obtained therein partial relief. From the order of the district court both parties have appealed to this court. The defendant first perfected its appeal and is designated in the record as the appellant. Thirty-one other like appeals by as many other property owners from the same action of the city council were by stipulation of parties heard and determined in the district court upon the same evidence, and are submitted

here upon the same record. *Affirmed* on plaintiff's appeal and *reversed* on defendant's appeal.

*W. H. Bremner, Read & Read, M. H. Cohen and W. M. McLaughlin*, for appellant.

*Hager & Powell, Dudley & Coffin and C. L. Nourse*, for appellee.

EVANS, C. J.—This case involves the assessment of the cost of paving West Grand Avenue, in the city of Des Moines, from Fourteenth Street to Twenty-Eighth Street. In the fall of 1903 a movement was set on foot among the owners of property abutting on said street for the repavement thereof. The street was already covered with a brick pavement, which had been laid about the year 1890, and which had become worn and defective. Petitions were circulated among the property owners for their signature, addressed to the city council and asking for such repavement. These petitions were signed by a very large majority of the property owners, including the large majority of the plaintiffs in these pending appeals. These signatures were not all attached to the same paper. For the convenience of the persons who circulated the petitions, five separate papers were used, and, as we understand the record, they were placed in the hands of as many different canvassers, each of whom presented the paper in his possession to such property owners as were interviewed by him. In all material respects these papers were duplicates of each other. After obtaining the signatures of property owners thereto, they were all presented to the city council and left with the city clerk. In the subsequent proceedings they were treated by the city council as the equivalent of a petition on the part of all the signers thereto for the repavement of such street. Three of these papers, which contained a large majority of the names presented to the



city council, expressly asked for a specified asphalt pavement at the maximum cost of \$2 per square yard. The other two papers asked for the repavement of the street, without making any specification of the kind of pavement desired. On February 15, 1904, the city council by roll call approved a proposed resolution of necessity for the paving of such street, and fixed March 7 as the time for final consideration thereof. This proposed resolution recited in its preamble that "the owners of the majority of the linear front feet of the property abutting" upon the street proposed to be improved had petitioned the council to repave the same, and that "a majority of the signers of said petition have indicated their preference for an asphalt pavement." Upon the final consideration of the resolution on March 7, 1904, no protests were made thereto, and the resolution was finally adopted upon roll call by a vote of six to three. Proceedings regular in form were had, which resulted in the letting of the contract on April 1, 1904.

Frequent reference to different portions of this contract will be necessary in the further discussion of this case, and we therefore set the same out at this point, as follows:

#### Contract.

#### For Paving West Grand Avenue

#### Assessment Work.

This contract, made and entered into this 1st day of April, 1904, by and between the Barber Asphalt Paving Company, party of the first part, and the city of Des Moines, in the county of Polk, and State of Iowa, party of the second part: Witnesseth: That the said party of the first part hereby agrees to furnish at his own expense all necessary material and labor, and to construct the improvements hereinafter designated, in a thorough, substantial and workmanlike manner, and in strict compliance with the requirements of this contract and the specifications and plans hereinafter set out or referred to, or hereto attached to the satisfaction and approval of the city en-

gineer and the board of public works of the city of Des Moines, to wit: Paving with asphalt West Grand Avenue between the west line of West 14th Street and the east line of West 28th Street, except that portion thereof between a line one foot north of and parallel with the north rail of the north street railroad track located on said street and a line one foot south of and parallel with the south rail of the south street railroad track there located, which excepted portions shall not be paved. The asphalt to be used to be of the best quality of refined asphalt taken from the Pitch Lake in the Island of Trinidad. About 22,000 square yards of asphalt paving, more or less. . . .

The party of the first part further agrees to perform the said work in strict accordance with this contract, and with the plans and specifications hereinbefore referred to, at the price of \$2<sup>00</sup>/<sub>100</sub> per square yard, which shall be in full compensation for the cost of the entire work, and the city of Des Moines shall not be liable to said party of the first part for extras of any kind or for any damage which he may sustain by coming in contact with rock, sand, water, or any other unforeseen obstacle or material, or by reason of unfavorable weather, it being expressly understood that the contract price above specified shall be in full for all work done under this contract.

It is further agreed that the cost of said work shall be assessed according to benefits against private property fronting or abutting on the street or streets upon which said improvements are made, and shall be payable, within the time and in the manner provided by law and the ordinances of the city of Des Moines, relating to the paving and curbing of streets and alleys and the construction of sewers, and providing for the assessment and the cost thereof against abutting property and the issuance of assessment certificates therefor, and the party of the first part hereby agrees to receive the assessment certificates issued in compliance therewith, in full payment and compensation for all work done and material furnished in the performance of this contract, without recourse on the city of Des Moines, it being expressly understood that the duty and liability of said city of Des Moines, to the party of the first part, or to any person claiming under him, shall be confined to its power to impose said assessment and de-

liver the assessment certificates, to said parties of the first part, or the person or persons entitled thereto.

[Provided, however, that if any portion of the cost of said improvement may not be lawfully assessed against abutting property, such portion of such cost shall be paid by the city of Des Moines out of the city improvement fund to be created in accordance with the provisions of section 830 of the Code, but the liability of the said city for such portion of said cost shall be limited to the levy, collection and proper application of such tax and no general liability shall be created.]

Said party of the first part further agrees that the improvement herein contracted for shall be thoroughly and substantially constructed in accordance with the provisions of this contract and the specifications herein referred to, under the penalties set forth in the certain bond executed by said party of the first part, of even date herewith and hereto attached, which is expressly made a part of this contract [and to that end hereby further agrees, undertakes and guarantees that the material and workmanship employed in or upon the work shall be of such character that the pavement shall endure, without need of repairs, during a period of seven years from and after the completion thereof; and that in case any depression greater than three-eighths of one inch within the length of a four-foot straight edge occurs or any sign of disintegration appears, or any defects occur within said period, except such as are without the fault of the contractor, caused by reason of excavations in the pavement, and except such defects as arise from causes not incident to the ordinary usage of street pavements; then the contractor will, within ten days from the time of being notified of such defect, make the same good or will pay to the city of Des Moines the reasonable cost of remedying such defect. It being the intention that the party of the first part hereby guarantees that the improvement herein specified shall be and remain (except as to defects that may appear, or repairs which may be needed by reason of excavations or disturbances of the street, not caused by said party of the first part, its agents, servants, or employes), at the end of seven years from the completion thereof in as good condition in all respects as when completed and as required by the contract

and specifications embodied in said contract; and shall be and remain a good, substantial, reliable and durable pavement in material and workmanship as a whole and in all its parts except ordinary wear: Provided, it shall be the duty of the party of the first part, or his sureties, to notify the Board of Public Works in writing to inspect said improvement within thirty days prior to the expiration of said term of seven years and until the Board of Public Works shall be so notified, the above obligation to maintain the said improvement in good condition and repair shall continue and remain in force]: Provided, further, that nothing herein contained shall be construed to release said party of the first part or his sureties from liability through consequence of any wrongful, fraudulent or negligent act of the said party of the first part, his agent or employes, in the construction of said improvements which shall not have been disclosed at the expiration of seven years above mentioned.

So far as appears in this record the improvement was completed in strict accord with the contract on June 15, 1904. A schedule of proposed assessments was prepared by the proper officers and a notice of assessment published on July 2, 1904. Within the time allowed by the statute the plaintiffs filed objections to the proposed assessment. After a hearing thereon by the city council on August 3d, the city council overruled such objections, and ordered the assessment in accordance with the proposed schedule. Upon appeal to the district court the findings of the district court were adverse to the plaintiffs upon all objections save one. That one related to a claim of credit by the plaintiffs for the value of the brick contained in the old pavement. The lower court allowed such credit, and cancelled the assessment, and ordered a reassessment to be made for the balance due after allowing such credit. Inasmuch as the case is triable *de novo* here, we will take up the questions involved as nearly as may be in their logical order, rather than to consider first the questions presented upon appellant's appeal.

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I. Before proceeding to the consideration of the merits of the case, however, it is necessary for us to determine one dispute of fact between the parties as to the state of

1. MUNICIPAL  
CORPORATIONS:  
special assess-  
ments: ob-  
jections: evi-  
dence of filing.

the record. The objections filed by the plaintiffs before the city council were in the form of an original paper conceded to have been filed in time, and two successive amendments thereto filed at later dates. The time for filing objections expired on July 22d. The first amendment to the objections is known in the record as "Exhibit 6a and b." At the time of the trial in the district court it was not found among the files and records of the city clerk, but was produced by plaintiffs' counsel. The paper actually produced by plaintiffs' counsel contained no filing mark thereon. It is claimed by the defendant that it should be disregarded as not having been filed; or, if filed, that there was no proper evidence that it was filed in time. It appears from the testimony of counsel who prepared it that the paper was prepared in manifold to be used by many objectors, and that a large number of the manifold sheets were taken to the clerk's office and filed therein, and that the clerk actually did place a filing mark upon some of them. We infer also from this testimony that counsel kept some of the forms. This testimony of counsel is abundantly corroborated by other testimony and by the circumstances, and we are fully convinced of the truth of it. This exhibit, therefore, will be deemed as a part of plaintiffs' objections duly filed.

The second amendment is conceded to have been filed after the hearing before the council which occurred on August 3d. It is claimed by counsel for plaintiffs that at

2. SAME: objec-  
tions: waiver.

the time of the hearing they notified the council that such additional objections would be filed, and that the council assented thereto. Accepting this statement of fact, it does not meet the requirements of sections 823 and 824. This amendment

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must therefore be disregarded in the consideration of this appeal. We may say, however, that notwithstanding this holding we have examined the objections set forth in such amendment, and find nothing in them which in our judgment would avail the plaintiffs to defeat the assessment, even though such amendment had been made in time.

II. The first contention of plaintiff is that the contract which was entered into with the contractor for the construction of this improvement was not in accord with

3. CONTRACTS FOR  
PUBLIC IM-  
PROVEMENT:  
conformity  
with prior  
proceedings.

the specifications, nor in accordance with the bid, and that, therefore, the contract was not let in pursuance of any bid nor as the result of competitive bidding. The part of the

contract which is objected to, and which is referred to in the arguments as a "rider," is that part which we have indicated in the first brackets in the copy above set forth. The argument is that this provision is a substantial departure from the terms set forth in the specifications and notice to bidders. Where a statute provides for competitive bidding as a condition precedent to the letting of a contract, the courts have usually been strict in requiring that the contract finally entered into with the successful bidder shall conform substantially to the terms and conditions previously laid down as the basis for the competitive bidding. Any other rule would open the door to favoritism, and tend to destroy fair competition. As to what constitutes a substantial conformity in a given case, there is variance in the holdings of courts. Generally speaking, it may be said that literal conformity is not required, and that the rule of substantial conformity is applied with greater strictness in cases where the right to enter into the contract is challenged at the inception of the proceedings and before the contractor has constructed the improvement, and in those cases where there was a previous understanding with the successful bidder which was withheld from the other bidders.



In the case at bar the notice to bidders contained this provision: "All the expense of constructing said paving to be charged to the property abutting thereon, in accordance with the law governing the same, and

4. SAME.

payment for said work to be made in assessment certificates which shall be accepted by the contractor in full payment for all work done under his contract." It is not claimed by plaintiffs that the "rider" referred to was of itself prejudicial to the abutting property owners; nor that the contractor has any occasion to resort to its provisions for the collection of his pay. Nor do they claim that if the contractor should resort to its provisions for the collection of any part of his pay, it could in any wise operate prejudicially to the abutting property owners. Their contention is that this added provision was advantageous to the contractor from his point of view at the time it was incorporated in the contract, and that it was therefore a substantial departure from the bid and rendered the contract void. There is nothing in this record that would justify a suspicion that this provision was incorporated in pursuance of any previous secret understanding. It will be noticed that the specifications called for an assessment "to be charged to the property abutting thereon in accordance with the law governing the same."

The law governing the same is contained in sections 792a, and 792b, Code Supp. 1902, and in section 830, Code. These specifications incorporated the law by special reference, even though it might not have been necessary to do so. There might be some room for a difference of opinion as to the construction to be placed upon the statute above referred to. By this "rider" the parties agreed upon a construction of the statutes in advance. If the agreed construction was correct, it can furnish no ground of complaint. If incorrect, possibly a different conclusion ought to be reached. We are of the opinion that the language of the specifications as contained in the notice to bidders

contemplated full payment to the contractor, and not a partial one. Such payment was to be made in assessment certificates legally assessed. The duty of making a legal assessment was upon the defendant. If an assessment for the full cost could not lawfully be made, would the duty of the city then be at an end? The parties agreed otherwise in their construction of the statute as disclosed by the "rider." To say the least, the statute would bear the construction thus placed upon it. *Iowa Pipe Line Company v. Callanan*, 125 Iowa, 358; *Younkers v. Des Moines* (Iowa), 101 N. W. 1129.

It should be said also in this connection that there was in force at the time of such contract an ordinance of the city, enacted in 1900, which required all such contracts to contain a provision substantially similar to the "rider" complained of; the language of such ordinance being as follows: "The cost of said city improvement will be paid in assessment certificates for the amount assessed, and that the balance of said costs will be paid in warrants on the city improvement fund, payable out of the proceeds of the tax levied therefor, and the contract shall contain like provisions." In view of the fact that the contract as entered into was never objected to in advance of its performance by the contractor, and that the contract has been fully performed in accordance with the terms of the specifications themselves, and that the "rider" complained of has not in fact been of any benefit to the contractor and that it was in its essence only an attempt to agree in advance on the law, and that the provision was to some degree beneficial to the city and a compliance with its general ordinance in protecting it against a general liability for deficiency, we would not be warranted in holding that it was such a substantial departure from the specifications as to destroy the validity of the contract.

III. The plaintiffs' next contention is that they were prejudiced by a provision in the contract which bound

the contractor to guarantee the pavement and to keep the same in repair for a period of seven years.

5. SAME: contracts: guaranty provisions. The argument is that this threw upon the abutting property owners an additional burden which was not authorized by the statute. The provisions complained of appear in the copy of the contract which we have set out in the foregoing pages, and we have included the same in the second pair of brackets. These provisions furnish the plaintiffs no just ground of complaint. They are essentially a guaranty of a good job. They are in accord with section 814, Code Supp. 1902. They have been heretofore approved by this court. *Allen v. Davenport*, 107 Iowa, 91; *Osburn v. Lyon*, 104 Iowa, 160. It may be added, further, that the petitions for the pavement which were presented to the city council by the property owners contained a request that such a provision should be incorporated in the contract with the contractor.

IV. It is urged by the plaintiffs that the paving resolution was not adopted by a three-fourths vote, and that it was not petitioned for by the owners of the majority of the linear front feet of abutting property.

6. PETITION FOR PUBLIC IMPROVEMENT: signatures by agents: authority: evidence. There is some dispute between counsel whether the paving resolution was adopted by a three-fourths vote, or whether by the same vote as the resolution of necessity, namely, six to three. The fact is not disclosed by the record except by inference. The resolution purports to be adopted in pursuance of a petition by the owners of a majority of the linear front feet of the abutting property. It is claimed by the plaintiffs that this recital was not true in fact, and an issue was made upon it in the trial below. The trial court found against the plaintiffs on that issue. It is very doubtful whether the plaintiffs fairly made this objection before the city council. The written objection filed with the city council on this point was that "there was no petition be-

fore the council containing the names of citizens owning the majority of the linear front feet of abutting property."

The point made on appeal is, not that the persons whose names appear upon the petition do not own a majority of the linear feet, but that the names appearing upon such petition were not authorized. The proof offered in support of this contention is indirect and weak. Some of the names on the petition purported to be signed by authorized agents. A husband signed for the wife. In one instance the wife signed for the husband. A father signed for his child. No person whose name was so signed to the petition by another ever repudiated the act of such alleged agent, nor did any such person appear as a witness at the trial below to testify that the use of his name was not authorized. Plaintiffs offered evidence in some instances that certain written names appearing upon the petition were not in the handwriting of such property owner. The Hubbell estate was the owner of nearly one thousand one hundred linear front feet. Its name was attached to the petition by F. M. Hubbell and F. C. Hubbell, who constituted a majority of the trustees of the estate. It is contended that they had no power under the trust instrument to sign such petition. We have examined the instrument, and find that general power of management with certain specified restrictions is conferred upon a majority of the trustees. One of the signing trustees was the creator of the trust, and the two signing trustees are perhaps its principal beneficiaries. We think they had power to sign the petition. The Equitable Life Insurance Company was the owner of more than one hundred linear front feet. Its name was signed to the petition by its president, F. M. Hubbell. It is claimed that he had no authority to so use the name of the company, because there was no action by the board of directors. It is shown that Mr. Hubbell and his son, F. C. Hubbell, own practically all the stock of the company. The signature of the company

was attached by the president to the same paper that was signed by F. M. and F. C. Hubbell for the Hubbell estate, and presumably at the same time. There was no attempt at repudiation at any time by the board of directors. F. M. Hubbell signed also for his wife, without consulting her. She never repudiated the act. He continued to represent her in all the proceedings. These instances will suffice as illustrations of the nature of plaintiff's attack upon the sufficiency of the petition to the city council. In our judgment, the ground of attack is not sustained. Before the petition was acted on by the city council, notice was given as required by the statute. The petition purported to be signed by duly authorized agents. The city council is presumed to have satisfied itself on that question before it passed the resolution of necessity. Its findings make a *prima facie* case in that respect. *White v. Creamery Co.*, 108 Iowa, 522; *Allen v. Portland*, 35 Or. 420 (58 Pac. 509); *Hudson v. Bayonne*, 54 N. J. Law, 293 (23 Atl. 648). The evidence introduced by plaintiffs is not sufficient to overcome such *prima facie* case. We are not holding that the facts recited above are of themselves sufficient to prove affirmatively the authority of the signatures in question, but that they strongly support the *prima facie* case in favor of the findings of the city council. The petition, therefore, must be deemed to have been signed by the requisite number of property owners, and the paving resolution is not invalid for the want of a three-fourths vote.

V. Plaintiffs contend that the assessment was made in accordance with the front-foot rule, and not in proportion to benefits. Plaintiffs offer no proof on this question.

7. SPECIAL

ASSESSMENTS:  
benefits: front  
foot rule.

Neither did they present this objection in writing before the city council. The assessment purports to be made in proportion to benefits, and such finding is incorporated in the resolution. This recital is not impeached by the fact that the

result is the same as under the front-foot rule. If the general conditions and benefits applying to all the frontage are substantially the same, the result of an assessment is necessarily the same as if assessed under the front-foot rule. The law does not forbid such a result.

VI. It is urged, however, by the plaintiffs that they received no special benefits, and testimony has been taken upon that question upon both sides. On this question both sides have reveled in the incompetency of their testimony, though each has diligently urged the objection of the incompetency of the testimony of the other. The testimony is necessarily opinion evidence, and it brings into the record the usual variance of such evidence. Many of the plaintiffs were witnesses on their own behalf, and testified in substance that they got no benefit. Many of the most important of these witnesses were signers to the petition to the city council. This petition asked for the very kind of a pavement which was adopted. It also asked that the contract be not awarded at a bid exceeding \$2 per square yard. It also provided that "cost of said pavement to be assessed against the abutting property in proportion to benefits accruing thereto in accordance with the law governing the same." The contract was awarded at \$2 per square yard. In all the volume of this case no attack is made upon the fair performance of the contract. It is a fair inference that the property owners who signed this petition believed at that time that such a pavement would benefit their property to the extent of its cost. Opinions may, of course, properly change. It is quite human that they should adapt themselves to one's own interests, and that often without consciousness of wrong motive. No good reason is shown in this case for change of opinion on the part of the signers of the petition. Their opinion at that time was more disinterested than at the time of the trial. Without imputing to the witnesses any conscious wrong,

8. SAME: benefits: evidence.

we dare not lean too heavily upon their present opinions. Nor would we be warranted in annulling the assessment made by the city council on this ground upon the testimony contained in this record.

VII. As already indicated in our previous statement, the street in question was already occupied by an old pavement which had been in use for about fourteen years.

9. SPECIAL  
ASSESSMENTS:  
counterclaim  
for value of  
old im-  
provement.

It is contended by the plaintiffs that the brick of the old pavement belonged to them, and that they were deprived of their property by the act of the city officers in removing such brick and converting them to the use of the city. They contend that they are entitled to have the value of such brick offset against their tax. The court below sustained this contention, and in legal effect allowed the plaintiffs an offset amounting to about one-fourth of the tax levied. The appeal of the defendant is from this part of the court's order. It is conceded in the record that the cost of the old pavement was assessed against the abutting owners, and paid by them. It appears also that they paid the cost of some repairs that were made in later years. The defendant contends that the fee of the street was in the city, and that it necessarily was the legal owner of the pavement, that the special assessment that paid for it was a tax, and that it was levied upon the property owners by legal methods, and that they acquired no ownership in the pavement by virtue of paying the tax. On behalf of the plaintiffs, it is urged that for some reasons not appearing in the record the fee of this particular street is not in the city, that in any event, its ownership is in trust, and that, when the brick in question ceased to be a part of the pavement, it had no further right thereto, but that they reverted to the abutting owners as the beneficial owners thereof. They contend, also, that the benefits for which they were liable to special assessment were only such additional benefits as accrued to them by reason of

the difference between the new pavement and the old. We are inclined to accept this last proposition urged by the plaintiffs; but the testimony fails to show that the enhanced benefits by reason of the change of pavement were not equal to the amounts assessed against them.

If we were to go further, and accept the contention of the plaintiffs that they became the owners of the old brick when they ceased to be a part of the pavement, we do not see how that fact will avail the plaintiffs to sustain the action of the lower court. A municipal corporation has a twofold character. In the one character it may undertake obligations and subject itself to liabilities for which it is answerable as any other corporation or person at the suit of the aggrieved party. In the other character it is an arm of the sovereignty of the State. Power is conferred upon it to exercise governmental functions. Out of these powers arise corresponding duties. It becomes a trustee for the public. As such trustee, it may hold title to property and enter into contracts. In the case at bar all the proceedings leading up to the levy of the tax for the pavement in question were legislative in their character so far as the city of Des Moines was concerned. It had no beneficial interest of its own as a corporation in the special assessment tax that was levied against the abutting property of the street in question. The contractor was entitled to such tax. It was the duty of the city council to exercise its legislative functions for the levy of such tax. It could not refuse to do so of its own volition, nor could it disable itself from doing so by its own wrong. If we concede the plaintiff's contention that the city of Des Moines through its proper officers wrongfully converted to its own use property which belongs to the plaintiffs, its liability for such wrongful act was quite distinct from its duty to levy the tax for the benefit of the contractor who had performed his contract. The right of the contractor to his compensa-



tion could not be diminished by any wrongful act on the part of the city of Des Moines toward the plaintiffs.

There are other conclusive objections to plaintiff's contention. A special assessment is a tax. *Warren v. Henley*, 31 Iowa, 31; *Cassady v. Hammer*, 62 Iowa, 359;

10. SPECIAL  
ASSESSMENTS:  
diversion  
of funds.

*Tuttle v. Pope*, 84 Iowa, 12; *Farwell v. Des Moines Brick Co.*, 97 Iowa, 286; *Yeomans v. Riddle*, 84 Iowa, 147; Cooley on Taxation (3d Ed.) 1153; *Sargent v. Tuttle*, 67 Conn. 162 (34 Atl. 1028, 32 L. R. A. 822). A tax is not liable to counterclaim or set-off, nor is it subject to attachment or execution. *Bailies v. Des Moines*, 127 Iowa, 124; *Sargent v. Tuttle*, *supra*; 1 Cooley on Taxation (3d Ed.) 20; *Finnegan v. Fernandino*, 15 Fla. 379 (21 Am. Rep. 292). We believe the authorities are uniform on this question. No authorities are cited by plaintiffs in support of their contention. Under this rule, even if the special tax in question had been levied for the benefit of the defendant city, the plaintiffs could not extinguish them by interposing against them valid counterclaims against the city. Taxes are usually levied for particular purposes, and are carried in the public treasuries in separate and particular funds. It is essential to the machinery of government that they be collected and applied to the particular purposes for which they are levied. If they may be waylaid by the creditors of the municipality and seized by attachment or execution, or if the taxpayer may set off against them his counterclaims against the municipality, then the special purposes of taxation are thwarted, the power of the government to accomplish its ends is checked, and the orderly conduct of public affairs through the machinery of government may be rendered quite impossible. Parties, therefore, who have alleged claims against the assessing municipality, must pursue their ordinary remedy in the courts by independent action. And thus must the plaintiffs in this case proceed, if they have a cause of action against

the city for the value of the brick in question. We do not find it necessary to pass upon the validity of such claim, and we intimate no opinion thereon.

We do not overlook the argument of plaintiffs that their claim is not properly a set-off, but that it enters into and inheres in the question of amount of special benefits received by them. This argument is based upon the assumption that the assessments against their property are greater than the enhanced benefits conferred by the new pavement as compared with the benefits already existing from the old pavement. This assumption is not warranted by the record or by the state of the evidence. And, indeed, if it were, it would not sustain the argument. To award plaintiffs the old brick would not in any legal sense enhance the benefits of the new pavement, nor justify a larger assessment by the amount of their value. If these brick belonged to them, either as a matter of law or of equity they were entitled to avail themselves of such ownership regardless of the special assessment. Even then the special assessment could not exceed the special benefits conferred, exclusive of the benefits already enjoyed. If the plaintiffs were the owners of the brick, and if these were wrongfully taken and converted by any person, they have their causes of action against such person, whether it be the city or an individual. If it be the city, the rights of the plaintiff are no different than if it had been an individual. To determine on this appeal whether the plaintiffs owned such brick, and whether the city wrongfully converted the same, and, if so, what was their value, is to adjudicate a counterclaim. It brings into the appeal issues which do not inhere in the special benefits arising out of the new pavement, and which were never contemplated by the statute. The statute conferred upon the city council no power to take cognizance of such issues. Nor can the court do so on appeal.

VIII. Most of the abutting property is of greater

depth than one hundred and fifty feet. Under the statute assessment could be made thereon only to the extent of one hundred and fifty feet of depth. The assessment was in fact made by the city council on the whole property, regardless of depth. No complaint on this subject was made before the city council. But the assessment was made after the hearing and after the expiration of the time for filing objections. The proposed schedule of assessment was on file for twenty days before the time of hearing objections. It is urged by appellant that this schedule disclosed a proposed assessment against the entire property in each case, and that the plaintiffs waived the irregularity by failing to object thereto. If the assessment resolution was prepared in advance and attached to the schedule as a part thereof, appellant's contention in this respect would doubtless be correct. But the schedule itself, as distinguished from the formal resolution, does not disclose such purpose. The record before us does not show that the proposed assessment resolution was on file at the time of the hearing or prior thereto. The "paving assessment resolution" as finally adopted was introduced in evidence as Exhibit 7. And the schedule was attached to it, and it so appears in this record. But the record furnishes us no other information concerning it. The "assessment notice" makes no reference to the resolution. The question appears to have been passed on by the lower court.

The decree of the lower court ordered reassessment to be made to the extent of one hundred and fifty feet of depth. This part of the decree was not complained of by appellant in its opening argument in support of its own appeal. In its reply to appellees, it urged that this court should cancel the assessment only as to the excess of property over one hundred and fifty feet. The question that confronts us in this situation is: Shall we sustain the action of the lower court in the cancellation of the whole assessment on

11. SPECIAL  
ASSESSMENTS:  
waiver of  
irregularity.

12. APPEAL:  
correction of  
assessment.  
confirmation.

the ground that it covered more than one hundred and fifty feet, and on the ground that appellant waived the point by failing to argue, and shall we order a reassessment of the original tax on the proper dimensions of property; or shall we order the original assessment cancelled as to the excess of property only, and confirm as to the one hundred and fifty feet of each front? Were it not for the question of interest and penalties, it would be quite immaterial which course we should pursue, because either would lead to the same final result. If we should order a reassessment of the original amount, we think that legal interest should be included. In strict technicality, perhaps, we should treat the cancellation ordered by the lower court as accomplished, and we should order a reassessment of the original amount as determined by the city council together with legal interest against each property to the depth of one hundred and fifty feet. This would be a cumbrous process, serving no substantial interest to either party. In view of the peculiar circumstances of the case, we conclude to reach the proper result by the shorter and simpler course. The original assessment as made by the city council will be confirmed to the extent only of a depth of one hundred and fifty feet on each property, and cancelled as to all property in excess of such one hundred and fifty feet. The tax so confirmed shall draw legal interest as from the date of its original delinquency, but shall incur no penalties up to the present time. The defendant may at its election take a decree in this court, or have the case remanded to the lower court for a decree in accord herewith.

For the reasons stated, the decree below is *affirmed* on plaintiff's appeal, and *reversed* on defendant's appeal.

W. M. THARP, Appellant, v. J. W. KERR ET AL.,  
Appellees.

**Execution sales: ACTION TO REDEEM.** Mere inadequacy of price is not  
1 ground for interference by a court of equity with the statute limiting the time of redemption from an execution sale, but relief may be granted against a sheriff's deed in such cases because of mistake preventing redemption within the statutory time.

**Same.** A debtor cannot set aside a deed on execution sale because  
2 of mistake preventing redemption, where there was another execution sale of the property on a later date, and neither an averment in his petition that he was misled as to the time for redemption from such later sale, nor that he offered to redeem therefrom prior to issuance of a deed.

**Same: TENDER OF REDEMPTION.** After issuance of a sheriff's deed on  
3 execution the clerk of courts has no power to accept redemption, and a tender to him is unavailing for that purpose; but as a basis for an equitable action to redeem the debtor should notify the holder of the deed of his claim of right to redeem and tender to him the amount necessary therefor.

**Same: REDEMPTION: EXTENSION OF TIME.** The statutory right to re-  
4 deem from a sheriff's sale on execution must be exercised within the time prescribed; the courts have no discretion or power to extend the time as an act of mercy.

*Appeal from Van Buren District Court.*—HON. F. W. EICHELBERGER, Judge.

SATURDAY, JANUARY 23, 1909.

THIS is an action in equity to redeem from sheriff's sale of real estate. There was a demurrer to the petition which was sustained by the lower court, and decree entered for the defendant. Plaintiff appeals.—*Affirmed.*

*Robert & H. B. Sloan and J. C. Mitchell*, for appellant.

*Walker & McBeth*, for appellee.

EVANS, C. J.—It appears from the averments of the petition: That in September, 1902, one Scotten obtained judgment against plaintiff in Van Buren County for \$379. In November, 1903, the Holder-Teter Lumber Company obtained one judgment against him for \$199.50 and costs, and another judgment for \$2.60 and costs. These judgments all remaining unpaid, in November, 1904, executions were then issued under all of them, and the same were levied upon the real estate in controversy. On December 5, 1904, the sheriff sold the real estate under each of the two smaller executions, and the property was bid in by the execution plaintiff at each sale for the full amount of the judgment and costs. On December 8, 1904, the sheriff again sold it under the larger execution in favor of Scotten, and it was bid off by one Walker for the full amount of the execution and costs. Walker subsequently assigned his sheriff's certificate to Holder et al. No redemption was made from either sale during the year of redemption. Thereupon on December 9, 1905, the sheriff executed a sheriff's deed to Holder-Teter Lumber Company, and it conveyed the same property by quitclaim deed to the defendant Kerr. On August 20, 1905, plaintiff wrote to the sheriff who conducted the sales, asking for information concerning the same, and for the date of expiration of the year of redemption. The reply to this inquiry was made partly by the clerk and partly by the sheriff, as follows: "Dear Sir: Amount to redeem the two sales is \$20.98 for the small one, and \$208.00 for the other. Each day adds some interest to the amount. E. F. Putman, Clerk. Date of expiration of redemption, December 5, 1905. R. P. Ramsey. Pay to Clerk." Plain-

tiff made a mistake in reading Sheriff Ramsey's reply, and understood therefrom that December 15, 1905, was the day of expiration. The immediate occasion of this mistake was that in front of the figure 5 of the date as written by the sheriff was a slight irregular mark extending vertically down about halfway to the line. This gave some appearance of 15, instead of 5, as the date named in the letter. Plaintiff's averment is that, "by reason of such mistake of fact, he was prevented from paying the same within the time provided by law, but as soon as he learned of it, and before the expiration of the time as he understood it, he offered to redeem by paying the amount necessary so to do as required by law to the clerk, and he is now and at all times since has been ready and willing to pay the same for said purpose, and hereby tenders such sum as may be necessary, and as the court shall so adjudge to be necessary therefor, with such interest, if any, as the court may require." There is also the general averment that he was not negligent and that he was acting in good faith. There is no other averment of fact as to the manner in which he was prevented by such mistake from making redemption, nor as to the manner or time in which he attempted or offered to redeem, nor as to any offer or tender to the holder of the sheriff's deed. This suit was commenced March 14, 1907. The full amount required to redeem in December, 1905, was approximately \$700. The value of property was \$2,500.

I. To say the least, the plaintiff has not made an impressive case on paper. The inadequacy of the price is great, and appeals to the court. But it has always been held that mere inadequacy of price will not justify an interference by a court of equity with the operation of the statute. *Griffith v. Harvester Company*, 92 Iowa, 642; *Sigerson v. Sigerson*, 71 Iowa, 476; *Peterson v. Little*, 74 Iowa, 223; *State Savings Bank v. Shinn*, 130 Iowa, 368. That a court

1. EXECUTION  
SALES: action  
to redeem.

of equity may grant relief where a party has been prevented from making redemption by accident or mistake may be conceded. *Wakefield v. Rotherham*, 67 Iowa, 447. Whether it can be said that the averments of fact in this case show such a mistake as a court of equity may take cognizance of, and whether it can be said that such mistake was without fault of the plaintiff, and whether it can be said that such mistake caused the failure of redemption, are questions of grave doubt, to say the least. At these important points the allegations of the petition lack directness and specific statement, even if they are not manifestly evasive.

Appellant has furnished us with a reproduction of the appearance of the sheriff's letter which misled him. Without saying that it might not, under some circumstances

have misled a reader thereof, we are not  
2. SAME. greatly impressed by it. It will be observed, also, that the letter of the clerk and sheriff purported to refer only to two of the execution sales, being those held on December 5th. No reference whatever was made to the sale of December 8th. Appellant can not claim to have been misled by the letter as to the last sale, because it contained no reference thereto. True, he might have been led to believe by the letter that there were only two sales, but he does not so aver in his petition. If we should hold that he was honestly and in good faith misled as to the two sales of December 5th, it would only entitle him to relief as against those two sales. If, because of such mistake, the time of redemption had been extended up to December 15th as to those two sales, he would still have lost his property under the sale of December 8th, unless he had redeemed before the expiration of that year of redemption. His averment is that he offered to redeem within the period ending December 15th. The sheriff's deed was actually issued on December 9th under the sale of December 8th. Whether the plaintiff offered to redeem



before December 9th does not appear from his petition. We must, therefore, assume that he did not. This fact alone would put him beyond the reach of equitable relief, even though we should find that he would have been entitled to such relief as against the two sales of December 5th.

II. There is a further reason why we can not extend relief. Plaintiff avers that he offered to redeem by paying to the clerk, etc. We must construe his petition to mean that he made this offer to the clerk after the issuance of the sheriff's deed. The clerk had no power to accept redemption at that time, even though the plaintiff had been entitled to equitable relief. However, section 4057 of the Code provides that whenever any question arises with reference to the right of redemption the party claiming the right may deposit with the clerk the amount necessary to redeem, and file an affidavit which shall become the foundation of a hearing before the court or judge. The plaintiff did not pay any money to the clerk nor file any affidavit. His contention here is that such section has no application to a question arising after the expiration of the year of redemption. Accepting the plaintiff's contention on this point, without further discussing it, he can not claim an attempt to comply with section 4057. His offer of redemption, then, to the clerk becomes quite meaningless, except as it may bear upon the question of his good faith. There is no averment in his petition that he ever offered or tendered redemption to the holder of the sheriff's deed, or that he ever made known to him in any way his claim of mistake. If plaintiff had been misled by mistake and entitled to equitable relief against the sheriff's deed by reason thereof, then under a most elementary rule in equity the holder of the sheriff's deed was entitled to prompt notification of the mistake, and to the immediate offer of redemption and a tender of the amount necessary there-

3. SAME:  
tender of  
redemption.

for. For aught that appears here, the holder of the sheriff's deed would have recognized his right and accepted redemption. The plaintiff could not speculate upon his right to equitable relief against the mistake, and could not keep it as a continuing right to be exercised or abandoned in the future as he might see fit without first committing himself unreservedly to an offer and tender of redemption. To hold otherwise would be to enable the plaintiff to extend the year of redemption, not only to December 15th, but to an indefinite time thereafter.

III. As already indicated, the hardship involved in the inadequacy of price appeals to the court, but we can hold out only a shortened arm to the complainant in such a case as is presented here. The right to redeem from sheriff's sale is statutory. It must be exercised within the statutory time or the statute must fall into contempt. The time is fixed and certain, and presumably long enough. In any event, the statute confers on the court no discretion nor power of mercy in relation thereto. The inadequacy of price was as apparent at the beginning of the year of redemption as at its close. In this case the fact that the value of the property was greatly in excess of the debts tends to emphasize the dilatoriness and neglect of the plaintiff. His property was so largely in excess that he could at any time have negotiated a loan thereon sufficient to discharge the debts. If his margin of value had been less, his difficulties would have been greater. It is the debtor whose debts equal the larger part of the value of his property who has the real need of the last day of redemption, and who may, after all diligence, be compelled, for want of security, to see his margin of value disappear in the wreckage of a sheriff's sale. In this case plaintiff had two years' time to pay the first judgment, and one year to pay the other two, before executions were levied on his property. The statute gave him another year of redemption. After the expira-

4. SAME:  
redemption:  
extension  
of time.

tion of the year of redemption, he waited fifteen months longer before making an offer of redemption to the holder of the sheriff's deed.

His property was at all times sufficient security to enable him to refund his debts. He could have refunded his debts and redeemed his property on any day he might choose during the preceding two or three years; but he chose to wait until the last day of the last year. The chasm and the brink were more inviting to him than safe ground. He has found a pit which is beyond our reach. Although equity will always seek to relieve against the consequences of accident or mistake, it must guard itself that it offer no premium to neglect or default. Nor can it make too light of the statutory rights of the adverse party. We see no ground in this case upon which we can properly interpose our equitable jurisdiction against the operation of the statute.

The decree of the court below is *affirmed*.

WEAVER, J., not sitting.

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JAMES FOREMAN, Appellant, v. WESTERN UNION TELEGRAPH Co., Appellee.

**Telegraphs: DEATH MESSAGE: NONDELIVERY: RECOVERY FOR MENTAL SUFFERING.** Relation by affinity, only, will not raise a presumption of such cordial intimacy between the deceased and the addressee in a death message, as will support a recovery for mental suffering for its nondelivery, but the intimate relations of the parties must be shown; it is not necessary however that the company should know of their special relations at the time of sending the message.

**Same.** A son may recover damages for mental anguish by reason of the nondelivery of a message to his father announcing the death of his wife, thus causing the father's failure to attend the funeral; and it is not necessary to the recovery that the telegraph company had notice that it would cause him mental anguish if his father were not present.

*Appeal from Buchanan District Court.*—HON. FRANKLIN C. PLATT, Judge.

WEDNESDAY, JUNE 10, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

ACTION at law to recover damages for the nondelivery of a telegram. The trial court directed a verdict for plaintiff in the sum of \$1, and he, plaintiff, appeals.—*Reversed.*

*Cook & Cook*, for appellant.

*Carr, Hewitt, Parker & Wright, Geo. H. Fearons*, and *E. E. Hasner*, for appellee.

DEEMER, J.—The petition is in two counts. In the first plaintiff asks damages for pain and anguish resulting from the failure of defendant to deliver a telegram sent by his plaintiff's son from Wausa, Neb., announcing the death of the son's wife; and, in the second, for pain and anguish suffered by the son resulting from the nondelivery of the message to plaintiff, the said claim having been assigned to plaintiff. It was alleged in each count that defendant, when it received the message, was informed that it related to the death of the son's wife. The message read as follows: "To James Foreman, Independence, Iowa. Sena died at 2:30 this p. m. W. J. Foreman. September 22nd, 1906"—and the charge upon the same was \$1, which was paid by the son, W. J. Foreman. At the conclusion of plaintiff's testimony, the trial court directed a verdict for plaintiff in the sum of \$1, the amount paid for sending the message. The motion was sustained on the theory that the failure to deliver the message was not the proximate cause of the pain and suffering; that the relationship of the parties

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being by affinity only was not such that pain and suffering would be presumed; that it did not appear from the message that it was desired that plaintiff should attend the funeral, and that the defendant had no notice that any such attendance was desired, or that any special relations existed between plaintiff and his daughter-in-law as that pain and suffering would follow from the nondelivery of the message. Neither count of the petition contains an allegation of any special relations of friendship or affection between plaintiff and his daughter-in-law; nor does it charge the defendant with notice or knowledge thereof.

It is contended for appellee that, as there was no blood relationship between the plaintiff and his daughter-in-law, no presumption of pain and suffering obtains, and that it was incumbent on plaintiff to show by allegation and proof that such relations, in fact, existed between them as that pain and suffering in fact arose out of the nondelivery of the message, and that defendant had knowledge thereof. As to the second count of the petition, it is contended that, as the son did not notify the telegraph company when he filed the message that he would suffer if his father were prevented from attending the funeral, no damages are recoverable beyond the nominal sum paid for the message. It is further argued that the testimony shows that the son's suffering, if any, was due to the failure, not only of the father to attend the funeral of his wife, but also to his sisters' absence from the funeral, and that the son did not distinguish the suffering sustained by reason of the failure of the father to attend from that of his anguish over the nonappearance of his sisters. The negligence of the defendant in failing to make delivery of the telegram is practically conceded, and our discussion will be confined to the propositions above stated.

That there may be a recovery of substantial damages

due to pain and suffering from the nondelivery of a death message is the rule of this court. See *Mentzer v. Telegraph Co.*, 93 Iowa, 752; *Cowan v. Telegraph Co.*, 122 Iowa, 379; *Hurlburt v. Telegraph Co.*, 123 Iowa, 295. In each of

1. TELEGRAPHS:  
death message:  
nondelivery:  
recovery for  
mental  
suffering.

these save the *Cowan* case there was a blood relationship between the parties. In *Cowan's* case the sender of the message was the wife of the deceased, and the message was to be delivered to her relatives. These cases also establish the rule that, when there is a close blood relationship, friendly, affectionate, and cordial relationships will be presumed, and that there need be no affirmative proof that they existed. The question we now have before us is: Will such relations be presumed in cases where the parties are not related by blood but by affinity only? Upon this proposition there is a sharp and decided conflict in the authorities. The action being for tort, our rule is "that the party at fault must respond for all the injurious results which flow therefrom by ordinary and natural sequence without the interposition of any other negligent act or overpowering force." That one will suffer from failure to deliver a message relating to the death of a near relative is to be presumed, and damages therefrom follow as an ordinary and natural sequence; but where the relationship is by affinity, and no facts are either pleaded or proved showing any special friendship or affection, no presumption of pain and suffering should arise, for it is common knowledge that from such relationship alone no presumption arises which will justify an inference that for failure to deliver a message pain and suffering will result. Some cases, and perhaps a majority of them, go to the extent of holding that, even if such special relations of affection and friendship exist, there is no liability on the part of the telegraph company unless it has knowledge or notice thereof. But this rule does not appear to us to be sound. The question we

regard as one of presumption of pain and suffering, rather than of notice to the company. If the special relations exist, damage follows as a necessary sequence, and it is not necessary to show that the defendant had knowledge of these special relations. The message related to the death of the son's wife, and of this defendant had knowledge. The relationship of the parties need not appear upon the face of the message, nor is it essential that defendant should know of the special relations existing between the parties interested. That some damage would likely be expected to follow from failure to deliver defendant well knew; and it is not essential that it be advised of the exact damage to be anticipated. *Lyne v. Telegraph Co.*, 123 N. C. 129 (31 S. E. 350); *Cashion v. Telegraph Co.*, 124 N. C. 459 (32 S. E. 746, 45 L. R. A. 160); *Kenson v. Telegraph Co.*, 126 N. C. 232 (35 S. E. 468); *Bennett v. Telegraph Co.*, 128 N. C. 103 (38 S. E. 294); *Hunter v. Telegraph Co.*, 135 N. C. 458 (47 S. E. 745); *Telegraph Co. v. Coffin*, 88 Tex. 94 (30 S. W. 896); *Telegraph Co. v. Crocker*, 135 Ala. 492 (30 South. 45, 59 L. R. A. 398). The rule above announced seems to be sound in principle, although it is not in accord with that adopted in Alabama, South Carolina, and Texas. See *W. U. Co. v. Ayers*, 131 Ala. 391 (31 South. 78, 90 Am. St. Rep. 92); *Butler v. Telegraph Co.*, 77 S. C. 148 (57 S. E. 757); *W. U. Co. v. Wilson*, 97 Tex. 22 (75 S. W. 482). Of the South Carolina cases it may be said that they are based upon a statute allowing recovery by blood relatives. See *Amos v. Telegraph Co.*, 79 S. C. 259 (60 S. E. 660). And in Alabama the rule is somewhat in doubt in view of the decision in *W. U. Co. v. Crocker*, 135 Ala. 492 (30 South. 45, 59 L. R. A. 398). By reason of plaintiff's failure to allege and prove special, affectionate, friendly and cordial relations between him and his son's wife, the trial court was right in directing a verdict on the first count of the petition.

II. The second count of the petition is for mental anguish suffered by the son because of his father's failure to attend the funeral of the wife. Defendant was notified when the message was filed, that it

2. SAME.

related to the wife of W. J. Foreman. It is contended that defendant is not liable on this count, for the reason that it was not notified that the son would suffer if his father should be prevented from attending the funeral. There is no merit in this contention, although it seems to have some support in the cases. See *W. U. Co. v. Luck*, 91 Tex. 178 (41 S. W. 469, 66 Am. St. Rep. 869); *W. U. Co. v. Weniski* (Ark.) 106 S. W. 486. Our own case of *Cowan v. Telegraph Co.*, *supra*, seems to settle this proposition in favor of appellant. Moreover, the cases relied upon by appellee are not strictly in point. In view of the holding in *Cowan's* case, there is no need for further discussion of this matter. See, also, as sustaining, the same rule, *W. U. Co. v. Crocker*, 135 Ala. 492 (33 South. 45, 59 L. R. A. 398); *Telegraph Co. v. Giffen*, 27 Tex. Civ. App. 306 (65 S. W. 661). The trial court was in error in directing the verdict on this count.

III. One ruling on the admission of testimony is complained of. If there be error here, it was afterward cured, for the same matter was proved by another witness.

For the errors pointed out, the judgment must be, and it is, *reversed*.

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M. V. GANNON, Administrator of the Estate of PATRICK JOSEPH KILEY, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

**Railroads: PASSENGERS: NEGLIGENCE.** The relation of passenger is not severed by temporarily alighting at a passenger station, while the train is waiting, for the purpose of exercise upon the station platform; and if the train is started without reasonable warning and opportunity to reenter the car, the carrier is negligent in



performing its contract of transportation, and is liable for the natural consequences of such negligence, unless the passenger has contributed to his injury.

**Same:** CONTRIBUTORY NEGLIGENCE. It is not conclusively negligence  
2 to attempt to board a moving train, when done with the approval and assistance of an employee authorized to act with reference to the transportation of passengers on the train; and a porter of a Pullman car is such an employee.

**Same:** JUDICIAL NOTICE. Courts will take judicial notice that porters  
3 of Pullman cars usually assist passengers in entering and alighting therefrom; and passengers may assume that they are employees of the railway company in such sense that they may be relied upon for such assistance.

**Contributory negligence.** Where the speed of the train when plain-  
4 tiff attempted with the assistance of the porter to board it was not shown, and the evidence was not conclusive of his negligence in holding to the car after losing his footing, and that he was aware of his danger, his contributory negligence was not conclusively shown, and a directed verdict for defendant should not have been entered.

*Appeal from Scott District Court.*—HON. A. J. HOUSE,  
Judge.

SATURDAY, OCTOBER 24, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

PLAINTIFF, as administrator of the estate of one Kiley, instituted this action to recover damages to decedent's estate resulting from the death of decedent from injuries received through the negligence of defendant's employees while deceased was a passenger attempting to get on board the train of defendant on which he was entitled to transportation. At the conclusion of the evidence, the court sustained a motion to direct a verdict for the defendant, and judgment for the defendant was entered accordingly. From the ruling on the motion, and from the judgment entered, the plaintiff appeals.—*Reversed.*

*Lane & Waterman and M. V. Gannon, for appellant.*

• *Carroll Wright, J. L. Parrish, J. H. Johnson and Cook & Dodge, for appellee.*

McCLAIN, J.—There is evidence in the record from which the jurors might have found, if the case had been left to their determination, that decedent and his wife, being passengers on a train of defendant, and riding in a Pullman car, dismounted from the train at Davenport for the purpose of resting themselves by walking on the platform during such time as the train might be stopped there, having the assurance of the Pullman conductor that there would be a stop of at least ten minutes; that, at the expiration of five minutes, the train was started without such signal or warning as to enable them with reasonable diligence to get up the steps of their car before the train was in motion; that Mrs. Kiley mounted the steps in safety, and the Pullman porter mounted after her, while the decedent, holding on the hand-hold with his left hand, ran along with the train, attempting to mount with the assistance of the porter; and that, after thus running for twenty-five or thirty feet, deceased lost his footing, and was dragged still further, when his body struck against the girder of a bridge over a street crossing and he received injuries which resulted in his death. While decedent was thus being dragged along, Mrs. Kiley appealed to the Pullman porter to stop the train, and, after a second appeal from her, he did so by pulling the cord operating the air brakes; but, before the train stopped in response to this action of the porter, the injuries to deceased had occurred. The only questions we need consider in determining the correctness of the action of the court in directing a verdict for the defendant are whether there was any evidence of negligence on the part of defendant's servants or employees causing the injury to deceased, and whether

there was any evidence that deceased was not guilty of contributory negligence.

I. Deceased continued to be a passenger while temporarily on the station platform, intending to continue his journey on the train, having descended from the train for

a temporary and proper purpose, that of exercise and relief from the fatigue of travel while the train should be stopped. *Parsons*

1. RAILROADS:  
passengers:  
negligence.

*v. New York C. & H. R. R. Co.*, 113 N. Y. 355 (21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 441); *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207 (19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541). "We think the weight of authority, reason and custom all require us to hold that where a passenger, without objection by the company or its agents, alights at an intermediate station, which is a station for the discharge and reception of passengers, for any reasonable and usual purpose, like that of refreshment, of sending or receipt of telegrams, or of exercise by walking up and down the platform, or the like, he does not cease to be a passenger, and is justified in the belief that the company is exercising due care for his safety." *Alabama G. S. R. Co. v. Coggins*, 88 Fed. 455, 458 (32 C. C. A. 1). If with knowledge that the passenger thus on the platform is intending to continue his journey on the train it is started without reasonable warning and opportunity for him to safely re-enter the car, the carrier is negligent in performing its contract of transportation, and is liable for the natural consequences of such negligence, unless the passenger has contributed to his injuries so as to defeat his right of recovery.

II. The attempt of deceased to mount the steps of the car after the train was in motion was not *per se* and necessarily contributory negligence on his part. It is true that by statute it is a crime for any one not employed on the train, or not an officer of the law in the discharge of

his duty, to get upon or off a car of any railroad company while the same is in motion without the consent of the person having the same in charge (Code, section 4811); but such act is not conclusively negligent if done with the consent, approval, or assistance of the conductor or brakeman or other employee authorized to act with reference to the transportation of the passenger on the car in question. *Pence v. Wabash R. Co.*, 116 Iowa, 279; *Galloway v. Chicago, R. I. & P. R. Co.*, 87 Iowa, 458. That the porter of a Pullman car is an employee of the railway company engaged in the transportation of the passengers riding in such car in the same sense that a brakeman of a train is such employee is well settled. *Pennsylvania Company v. Roy*, 102 U. S. 451 (26 L. Ed. 141); *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417 (4 South. 85, 8 Am. St. Rep. 538); *Dwinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117 (24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611). The cases relied upon as to this point by appellee are not pertinent. They involve the relations between the railway company and the porter of a Pullman car as involving the right of the porter to recover in an action against the railway company. See *McDermon v. Southern Pacific Co.* (C. C.) 122 Fed. 669; *Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525 (74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187); *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498 (20 Sup. Ct. 385, 44 L. Ed. 560.)

It is argued for appellee that there is no evidence in the record as to the authority of the Pullman porter; but we can certainly take judicial notice of the fact that the porters on Pullman cars with the consent of the railway company usually assist passengers in alighting from and entering such cars in the same way that brakemen render like assistance to persons riding in the ordinary passenger coaches, and

2. SAME:  
contributory  
negligence.

3. SAME:  
judicial notice.

that a passenger is justified in assuming that the Pullman porter is an employee of the railway company in such sense that he may be relied on by the passenger for such assistance or guidance as to his conduct.

If the act of deceased in attempting to mount the steps of the car after it was in motion was not in itself conclusively negligent, then there was not such evidence of contributory negligence as to justify the court in taking the case from the jury on the ground of the negligence of the deceased. It does not appear just how fast the car was moving at the time when plaintiff took hold of the hand rail, and attempted with the assistance of the porter to mount the steps, and there is no conclusive evidence that he was negligent in not desisting from his effort, after he lost his footing and was being dragged along the platform, for under such circumstances danger might have reasonably been anticipated from releasing his hold and dropping to the platform near the wheels. It does not appear from any conclusive evidence that deceased was aware of the danger from the girder toward which he was being carried. The cases relied upon in this respect for appellee are cases where a passenger was shown without question to have been aware of such danger. See *Hunter v. Cooperstown & S. V. R. Co.*, 126 N. Y. 18 (26 N. E. 958, 12 L. R. A. 429); *Knight v. Railway Co.*, 23 La. Ann. 462. Other cases relied on for appellee involving a finding of negligence in an attempt to get on or off a car while in motion lack the element which is present in this case of the approval and assistance of an employee in charge of the car.

The trial court was not justified in directing a verdict for the defendant, and its ruling in that respect and in entering judgment for the defendant is *reversed*.

J. KIRCHNER ET AL., Appellants, v. THE BOARD OF DIRECTORS OF SCHOOL TOWNSHIP OF WAPSINONOC, ETC., ET AL.

**School districts: SCHOOL HOUSE TAX: CERTIFICATION.** When the electors of a school district have voted a tax at the annual meeting for school house purposes, it becomes the duty of the secretary of the board to certify the same to the supervisors within the time and as required by Code, section 2767, regardless of any action of the board, unless the vote is rescinded by a subsequent vote of the electors.

**Same: LEVY OF SCHOOL HOUSE TAX.** The fact that the electors at their annual meeting voted a school house tax in excess of that which can legally be levied in any one year does not render the action of the electors void, but the supervisors should make the legal levy notwithstanding the excessive amount voted.

**Special school meetings: DUTY OF BOARD: DISCRETION: *Mandamus.***  
3 A board of school directors may call a special meeting of the electors when petitioned, to vote upon the question of rescinding a former vote authorizing a school house tax, but the statute makes the matter discretionary with the board and the court will not require it to act.

**Same.** After taxes levied for school purposes in accordance with a vote of the electors of the district have become due, and a part or all have been paid, an action to require the board to call a special meeting to vote upon the question of rescinding the former vote will not lie.

**School tax: CERTIFICATION.** The certificate of a school clerk to the supervisors certifying that a tax was voted by the electors upon the taxable property of the district is not void, because indicating an attempt to levy a tax on the property belonging to the district itself.

*Appeal from Muscatine District Court.*—HONS. D. V. JACKSON and J. W. BOLLINGER, Judges.

MONDAY, OCTOBER 26, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

THE opinion states the case.—*Affirmed.*

*E. M. Warner and Richman & Richman*, for appellants.

*Jayne & Hoffman*, for appellees.

SHERWIN, J.—The petition in this case was filed on the 25th day of January, 1907. It is alleged, in substance: That the plaintiffs were qualified electors of the school township of Wapsinonoc, in Muscatine County, Iowa, and taxpayers therein. That on February 26, 1906, at a called meeting of the board of directors of said school township, a petition was "accepted" by said board signed by eighty-three names, asking that there be submitted to the voters of said school township at their next annual meeting the proposition: "Shall a schoolhouse tax to the amount of \$8,000 be levied on the taxable property of the school corporation of Wapsinonoc for the purpose of erecting a school building as near the geographical center of the school township as practical?" That action was taken by the board providing for posting notices and procuring to be printed the necessary ballots, that on or about March 12, 1906, pursuant to notice, a vote was had in said school township upon the proposition above referred to, as appears by the record of said board, and said proposition was carried by ninety-four affirmative votes as against seventy-eight negative ones. It was further alleged that at the regular meeting of the board of directors of said school township held on March 19, 1906, a motion that said \$8,000 tax be levied, \$1,600 payable in 1907, and as much annually until paid, was voted down, and a motion to issue bonds for said \$8,000 at 4½ per cent. interest, payable semiannually,

was also voted down, and no further action relating to said matter was had at said meeting. That at an adjourned meeting of said board of directors March 26, 1906, provision was made for submitting to the electors at a special election to be held on the 14th of April, 1906, the question: "Shall the school corporation issue negotiable bonds not to exceed the amount of \$8,000." That said question was so submitted, and was defeated by a vote of the electors of the district. That at a meeting of the board of directors held July 2, 1906, a motion was offered to the effect "that the secretary be instructed to certify a tax of \$8,000, voted by the electors at the last annual meeting, to build a central schoolhouse, and that the board of supervisors levy each year \$3,200 until the amount be collected. The plaintiffs further alleged that the motion last referred to was lost, but that after the adjournment of said meeting and without authority, and falsely and fraudulently, the minutes of said meeting relating to said motion were altered, so that they showed a tie vote thereon. That thereafter without authority or direction from said board of directors, and under date of July 5, 1906, the secretary of the board certified to the board of supervisors in relation to said \$8,000 tax as follows: "I also certify that at a meeting of the qualified voters of the school township of Wapsinonoc, in the county of Muscatine, State of Iowa, held on the 12th day of March, 1906, a tax of \$8,000 was voted on the taxable property of said district for the schoolhouse fund, and that the board of supervisors levy each year the limit that the law allows until the said amount is received."

It is further alleged: That the certificate above referred to was wholly unauthorized by any action of the board of directors of the school township. That pursuant to said certificate, the board of supervisors of Muscatine County levied a special tax of ten mills on the dollar in addition to the ordinary taxes upon the taxable property



in said school township, which provides the sum of \$4,808.-79 to be collected with the taxes of the current year on account of said \$8,000. That said tax has been extended on the books of the county treasurer, and he is now demanding and seeking to collect the same from the plaintiffs and other taxpayers in said school township. Plaintiffs further alleged that in the latter part of August, 1906, a petition signed by more than two-thirds of the voters in said township was addressed to the president and board of directors of said school township, asking that a special election be called of the voters of said school township to vote upon a proposition to rescind their former vote of a tax of \$8,000 to build a central schoolhouse. That "said petition was presented and given to the president of said board of directors. But the said president and board of directors have ignored the said petition, and neglected and refused to call said special election or take any action whatever with reference to said petition." The petition further alleged that the original tax of \$8,000 was and is void for that "said electors . . . failed to designate that only a portion of said tax, less than ten mills on the dollar, should be paid in any one year." The prayer of the petition was as follows:

Wherefore plaintiffs pray that a writ of *mandamus* issue herein commanding the defendants, the said board of directors, and their officers to submit to the voters of said school township the proposition asked by the petition hereinbefore referred to at the regular annual election or special election called for the purpose within a reasonably short time. That meantime the defendant E. C. Stoker, treasurer of Muscatine County, Iowa, be restrained and enjoined from collecting ten mills of the sixteen and one-half mill tax levied against the property of said school township of Wapsinonoc, or at any rate such part of said tax as is levied against the plaintiffs herein and their property. And plaintiffs ask that a temporary injunction be issued to and against said defendant treasurer herein to said same intent and purpose, and for such other fur-

ther and different relief as the case may require and judgment for costs against the defendants A. B. Anderson and B. F. Herr.

The defendants filed a demurrer to the petition, alleging generally that it did not state facts entitling the plaintiffs to the relief demanded, and alleging specifically that the schoolhouse tax in question was regularly voted and regularly certified to the board of supervisors by the proper officers, and regularly levied by said board and spread upon the tax books, and that the school directors were under no obligations to call a special election to rescind the former action of the electors. That rights have become vested under the former action of the electors, and that the same is no longer subject to recall by the electors or by the officers of the school board. The demurrer was sustained generally, and the plaintiffs appeal.

The appellants in their brief and argument state that but two questions are presented for determination: First. "Was the original tax voted valid and enforceable?" Second: "Did the board of directors have a discretion to refuse to submit at a special election the petition of one hundred and sixty-four electors?" The appellants devote much of their argument to a discussion of the first question, but, aside from the question as to the certification of the tax by the secretary of the board, it is not applicable to the issues presented by the petition. There is no allegation of any illegality in the proceedings of the board of directors of the school township prior to the vote of the electors on the question in controversy, so that, so far as this branch of the case is concerned, it will only be necessary to determine whether the secretary of the board properly certified the action of the electors to the board of supervisors of Muscatine County, and whether the action of the electors in voting an amount in excess of the proceeds of a levy of ten mills on the dollar invalidated

the entire proceeding. These two questions we shall dispose of in the order in which they are stated.

Code, section 2767, provides as follows as to the duties of the secretary of the board, so far as the same is material to the question now under consideration: "With-

in five days after the board has fixed the amount required for the contingent and teachers' fund, he shall certify to the board of supervisors the amount so fixed, and at

1. SCHOOL DISTRICTS: school house tax: certification.

the same time shall certify the amount of schoolhouse tax voted at any regular or special meeting." This statute points out clearly and unequivocally the duties of the secretary of the board in relation to the matter under consideration. After the electors had voted the tax of \$8,000, it was the imperative duty of the secretary of the board to certify the same to the board of supervisors, unless the vote was subsequently rescinded by another vote of the electors. This duty did not depend at all upon the future action of the board or upon its failure to act. In making the certification under consideration, the secretary did no more than the law required of him. Had he done anything less, he would have failed in the proper discharge of his duty. The fact that he incorporated in his certificate a request that the board levy the tax in accordance with the law defining their duties is wholly immaterial. It is to be presumed that the board of supervisors acted and would act on the authority conferred upon them by the statute, and not on suggestions made by the secretary of the school board.

Section 2749 of the Code, in the seventh subdivision thereof, gives the voters assembled at the annual school meeting the power "to vote a schoolhouse tax, not exceeding ten mills on the dollar in any one year, for the purchase of grounds, construction of schoolhouses, the payment of debts contracted for the erection of schoolhouses, not including interest

2. SAME: levy of school house tax.

on bonds, procuring libraries and for and opening roads to schoolhouses." Section 2807 provides as follows: "The board of supervisors shall, at the time of levying taxes for county purposes, levy the taxes necessary to raise the various funds authorized by law and certified to it under this chapter, but if the amount certified for any such fund is in excess of the amount authorized by law, it shall levy only so much thereof as is authorized by law." It seems to us that this section of the statute answers clearly and definitely the contention of the appellants that the tax in question was illegal and void because the amount voted was in excess of the amount which could be realized from a levy of ten mills, the limit provided for in the statute. The Legislature evidently contemplated that the electors of school townships might vote a fund for the erection of schoolhouses in excess of the amount that could be realized by the statutory levy, and hence it was provided that in such cases the board of supervisors should make the legal levy notwithstanding the excessive amount voted by the electors. And we see no valid reason for holding that the vote of the electors should be declared void and of no effect simply because they voted a larger amount than could be levied in any one year.

The question whether the board of supervisors would have authority to make a ten-mill levy from year to year until the entire amount voted was realized is not properly before us in this case, and should not be determined. We go no farther than to hold that the action of the electors and of the board of supervisors at the time this suit was brought was fully authorized by the statute. It is a familiar rule that cases must be determined upon the facts existing at the time the case is commenced.

The important question presented in this case, as we view the matter is whether the board of directors of the school district were bound to call a special election for the purpose of submitting to the electors of the district the

question whether the former action in voting the tax should be rescinded, and whether the refusal

3. SPECIAL SCHOOL  
MEETINGS: du-  
ty of board:  
discretion:  
*mandamus.*

of the board to call such an election furnished ground for the relief prayed in the petition. Code, section 2749, to which we have

already referred, further provides as follows: "The board may, or upon the written request . . . of ten voters of any school township . . . shall, provide in the notice for the annual meeting for submitting any proposition authorized by law to the voters." Under this section it has been held that, when the requisite number of voters sign a written request for the submission at the annual meeting of any proposition authorized by law to the voters, it is the duty of the board to provide in the notice of the annual meeting for the proposition so requested to be submitted, but, in the absence of such written request, the board may exercise its discretion in the matter; but this section relates to the annual meeting only, while the written request presented in this case asked only that a special election be called for the purpose of rescinding the vote, and the action of the board thereon must be determined under the provisions of section 2750 of the Code, which provides "the board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, whenever the corporation has lost the use of a schoolhouse by fire or otherwise, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a schoolhouse tax for the purchase of the site and the construction of a necessary schoolhouse and for opening roads thereto." This section was amended by chapter 104, Acts 28th General Assembly (Laws 1900), by striking therefrom the words, "Whenever the corporation has lost the use of the schoolhouse by fire or otherwise." So that at the time of the transaction in question the board had au-

thority under the law to call a special meeting of the electors for the purpose of voting on the proposition to rescind. *Hibbs v. Board of Dir.*, 110 Iowa, 306. But the statute does not provide that the board of directors must call a special meeting upon the petition of the electors. No provision for such action on the part of the board is made. The statute goes no further than to give the board discretion in the matter. It may or it may not call a special meeting as the exigencies of the case may require. And; where a matter is discretionary with a board or public officer, the law will not interfere by *mandamus* to compel it to act in the very matter which is discretionary. *Preston v. Board*, 124 Iowa, 357; *Scripture v. Burns*, 59 Iowa, 70.

There is another reason why the ruling of the trial court on the demurrer should be sustained under the facts alleged in the petition. It will be remembered that the petition in this case was filed on the 25th  
 4. SAME. of January, 1907, and that it is alleged therein that the board of supervisors had already levied the special tax, that the same was due, and that the treasurer was proceeding to collect the same. These allegations of the petition must be taken as true for the purposes of this case. The law will presume, in the absence of any contrary showing, that taxes are paid when they become due, hence it is fair to say that at least a part, if not the whole, of the taxes due under the levy in question had been paid at the time this suit was brought, and, if this be true, it would follow as a legal proposition that rights had become vested which could not be disturbed in this action, and that the plaintiffs would have no right to ask for a vote rescinding the previous action of the electors. *Benjamin v. Dist. Tp.*, 50 Iowa, 650; *Edworthy v. Iowa, S. & L. A.*, 114 Iowa, 225.

The appellants also say that the clerk's certificate was a nullity and furnished the board of supervisors no

authority for its subsequent levy, because it stated that the tax had been voted on the "taxable property of the district." There is clearly no merit in this contention because any one would know that the electors had not attempted to raise a tax for the erection of a new schoolhouse by providing that it be raised from the levy on its own property.

The trial court was clearly right in sustaining the demurrer, and the judgment rendered thereon is *affirmed*.

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MARY BEANS V. ROBERT J. DENNY, Appellant.

141	52
140	327
142	684

**Security for costs: FILING OF PROOFS: WITHDRAWAL OF MOTION.** A de-

- 1 fendant in moving that plaintiff be required to give security for costs must present all his proofs with the motion, and he cannot withdraw his motion and refile it with the same and additional affidavits, at least without showing good cause; and when so withdrawn and refiled without leave of court it was not an abuse of discretion to strike it from the files.

**Evidence: REPUTED WEALTH.** A witness who has known a defendant

- 2 in a breach of promise suit for a long term of years, and resided in the same county practically all of the time, is qualified to testify to his reputed wealth in that county, where it is shown that defendant was well known.

**Same.** One may testify to the reputed wealth of a person in a com-

- 3 munity in which he has lived long enough to establish a reputation in that respect, although his residence there was temporary; but if the witness discloses a lack of knowledge on subsequent cross examination the remedy is a motion to strike.

**Evidence of value.** The price paid for land several years previous

- 4 and upon which valuable improvements have since been made is not competent in determining its present value.

**Breach of marriage promise: EVIDENCE: ISSUES.** Where the evi-

- 5 dence in a breach of promise suit was conflicting as to whether plaintiff was afflicted with a venereal disease prior to the time fixed for marriage, and whether the same was curable, an issue as to plaintiff's good health at the time of the alleged breach was presented.

**Same: INSTRUCTION.** Where there was no evidence that plaintiff was  
6 suffering from a venereal disease at the time of the engagement,  
as claimed by defendant, or that he had knowledge thereof at that  
time, an instruction requiring a finding of want of such knowledge  
at the time of the engagement as a condition precedent to a ver-  
dict for him, while superfluous, was not prejudicial.

**Same: JUSTIFICATION.** A person is excusable for declining to carry  
7 out his promise of marriage with one afflicted with an incurable  
venereal disease, unless made with knowledge of the disease.

**Same: PLEADINGS: ISSUES: INSTRUCTIONS.** A defendant cannot com-  
8 plain of the courts instructions regarding his plea in bar of a  
suit for breach of marriage promise, where the interpretation  
placed upon the pleading by defendant as disclosed in his re-  
quested instructions is adopted by the court.

**Same: EVIDENCE.** In a breach of promise action the conduct of the  
9 parties toward each other during the engagement period may be  
shown in determining the existence of the contract, and this in-  
cludes sexual intimacy.

**Same: CORROBORATION.** In breach of promise cases corroboration of  
10 plaintiff's evidence of sexual intercourse with defendant is not  
required.

**Evidence: CROSS-EXAMINATION.** The cross-examination of plaintiff  
11 in a breach of promise suit with respect to a subject not developed  
in the direct examination, and relating to a matter of defense  
which must be pleaded to be available, should not be allowed.

**Same: ILLICIT INTERCOURSE: EVIDENCE.** Where the parties to a breach  
12 of promise suit were the only witnesses on the question of their  
sexual intimacy, affirmed by plaintiff and denied by defendant,  
an instruction that mere opportunity would not warrant a finding  
that it occurred, nor be sufficient as corroborative evidence if the  
parties were equally creditable, but might be considered with  
other evidence on that subject, was correct.

**Same: DAMAGES: INSTRUCTION.** Where the court in one paragraph of  
13 the charge expressly told the jury not to allow damages for illicit  
intercourse, a further instruction that in measuring the damages  
for breach of the marriage promise, the intimacy of the parties  
and defendant's conduct toward plaintiff might be considered, did  
not authorize a finding of damage on that ground.

**Submission of issues.** Where the court told the jury to consider the  
14 intimacy of the parties and all injuries sustained by plaintiff  
including loss of affection, etc., failure to especially refer to de-  
fendant's plea in mitigation of damages that she had become ill-



tempered and expressed a dislike for defendant and his children was not reversible error, especially as no request was made therefor.

**Misconduct in argument.** In the absence of objection thereto error cannot be assigned on the use of improper language in argument to the jury.

**Trial:** ABSENCE OF JUDGE. Where there is no showing that a presiding judge was absent from the court room during the trial his presence will be presumed.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTH, Judge.

MONDAY, OCTOBER 26, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

THE defendant appeals from a judgment for damages resulting from an alleged breach of promise to marry.—*Affirmed.*

*Seerley & Clark* and *Blake & Wilson*, for appellant.

*Poor & Poor, J. E. Maley*, and *Charles Willner*, for appellee.

LADD, C. J.—The plaintiff, who was born in 1864, began work as housekeeper for defendant, sixteen years her senior, in 1900. His wife, who was then an invalid, died in 1901. There were three children, one away at school, and the others, aged sixteen and fourteen, at home. Plaintiff continued in his employment as housekeeper, with some intermissions, until June, 1906, and in September following this action for damages because of his alleged breach of promise to marry her was begun. Such promise is said to have been made in June, 1903, to be consummated after his daughter had finished school in 1905, and performance

then postponed until the spring of 1906. All this was denied by defendant, who pleaded, by way of mitigation, that the plaintiff had become ill tempered and had asserted hatred for him and his children, and, in bar, "that plaintiff was not and is not now in a physical condition by reason of disease to fulfill the duties of wife and mother, and that she should not marry, and defendant pleads said condition of plaintiff as a bar to this suit."

I. Previous to the answers defendant moved for security of costs on the ground that plaintiff was a non-resident of the State, supporting the same by his affidavit.

1. SECURITY FOR  
costs: filing  
of proofs:  
withdrawal  
of motion.

A counter affidavit of plaintiff was then filed. Six days later defendant filed six additional affidavits in support of the motion.

On motion of plaintiff, these were stricken from the files. Thereupon defendant withdrew his motion, and two days later filed another for security of costs with affidavits of like import, and by the same parties who had made those stricken. Upon motion of plaintiff, the second application for security of costs was stricken from the files; and this ruling is complained of. In withdrawing the first motion no right to file another was reserved or granted, and the last was filed without leave of court. The withdrawal of the one and filing of another manifestly was to avoid the effect of the statute exacting that all affidavits accompany such a motion. Section 3847 of the Code, as amended by chapter 100, Acts 27th General Assembly, provides: "That the application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded thereto by counter affidavits on or before the hearing of the motion and each party shall file all his affidavits at once, and none thereafter." In other words, the party moving for security for costs must present all his proof at the time of filing the motion, and none thereafter. To permit a party who has not so pre-

sented his affidavits to withdraw the motion, and refile it, accompanied with those at first omitted, would defeat the very design the lawmakers must have had in inserting this condition; that is, the prompt disposition of the application on the record as first made by the parties, and the avoidance of delay by an extended controversy over a collateral matter not in any way involving the merits of the case. Possibly the court for good cause might permit the withdrawal of such a motion and the filing of another; but, if so, the evasion of the effect of this statute and a previous ruling would not be good cause. There was no abuse of the discretion necessarily exercised by the district court in matters of this kind.

II. As tending to prove defendant's pecuniary condition, McIntire, a brother-in-law of plaintiff, residing at Middleton, a village fourteen miles from Burlington,

2. EVIDENCE: re- was allowed, over objection, to testify to de-  
puted wealth. fendant's wealth as reputed in Des Moines  
County. The witness had been acquainted with him for forty-six years, during all but four years of which time he had resided in that county. His cross-examination, as well as that of the defendant, indicated that the latter was well known in that and other portions of the county, and, though he had resided temporarily at Galesburg, Ill., for four years, his home was at Burlington, where he had lived a long time previous, and that he owned and supervised several farms in Des Moines and Louisa Counties. Under the circumstances disclosed, it was not error to receive this testimony.

III. One Brooks testified that defendant had said to him that he was owner of one thousand acres of land valued at \$100 per acre, that he knew his reputation as to wealth in Galesburg, Ill., and that he was  
3. SAME. reputed to be worth \$100,000. Exception was taken to the admission of this evidence on the ground that defendant was but a temporary resident of that city

for the purpose of educating his children, with his home in Burlington. It was enough if he had lived there long enough to establish a reputation in the respect testified to, and that the witness knew what it was. If want of knowledge appeared on cross-examination after the ruling of the court, the remedy was by motion to strike the evidence, as the ruling was correct when made. There was no error.

IV. Defendant offered in evidence a deed of one hundred and sixty acres of land executed to him in March, 1901, by Holden, and another of forty acres executed to him February 5th of the same year by Prindle. On objection, the portions of the instruments stating the considerations were excluded, and defendant was not allowed to testify what he had paid for the land. The ruling was correct. Six years had elapsed since the purchase, and in the meantime he had improved the land by tiling it and by the erection of buildings thereon. That the price for which land was recently sold may be shown as tending to establish its value is too well established to call for citation of authority; but, when the sale is somewhat remote and valuable improvements have been made since, it goes almost without saying that the price paid would not furnish any aid in determining or estimating the present value. The ruling has our approval.

V. The plaintiff was treated at a hospital in March, 1904. On the trial several physicians, upon hypothetical questions embracing the hospital record and treatment, and facts as to her physical condition which some evidence tended to show, expressed the opinion that she was then afflicted with syphilis, and was being treated for that disease. On the other hand, it appeared that, on application of defendant, three physicians were designated by the court to examine her, and, after doing so, they reported their inability to discover any traces of this disease. Other evidence was convincing that she had not been afflicted therewith. The record was such,

4. EVIDENCE  
OF VALUE.

5. BREACH OF  
MARRIAGE  
PROMISE: evi-  
dence: issues.

however, as to raise an issue as to whether she was then suffering therefrom, and, as there was a difference of opinion as to whether the disease is curable, and the time required to effect a cure, if possible, an issue as to whether she was in good health at the time of the alleged breach also was raised.

The court instructed the jury that "if at the time when the defendant refused to carry out the said alleged contract of marriage on his part the plaintiff was still

6. SAME:  
instruction.

physically affected by a venereal disease, which rendered her unfit for the marriage state, and you further so find that the defendant was ignorant of such physical condition of the plaintiff at the time when he entered into the said alleged contract of marriage with her, you should then find that the defendant was justified in refusing to marry the plaintiff. But, if you fail to find from a preponderance of evidence that the plaintiff was afflicted with an ailment of the character charged by the defendant during the said period of the said alleged engagement of marriage between the said parties, and that said condition was unknown to the defendant at the time when he entered into said engagement, or if you believe from the evidence that the plaintiff was during a part of the said time affected with such a disease, but became entirely and permanently cured of the same before the defendant refused to comply with the terms of the said marriage contract on his part, you should then find that the defendant was not justified in refusing to marry the plaintiff on account of her physical condition."

This instruction is criticised (1) for exacting a finding of want of knowledge at the time of the alleged engagement, (2) in that a finding that the disease rendered plaintiff unfit for marriage is made essential, and (3) in that the jury are told that even though plaintiff was afflicted with the disease in 1904, if she was cured by the time fixed for the marriage, this would not excuse defend-

ant from fulfilling his promise. As there was no evidence that plaintiff was afflicted with the disease in June, 1903, or bearing on defendant's knowledge thereof, the portion of the instruction first criticised was superfluous, but could not have been prejudicial to appellant; nor was there any conflict in the evidence as to this disease rendering a person unfit for matrimony.

The court might well have omitted the qualifying clause, and directed the jury that a person is always excusable for declining to carry out his promise of marriage to one afflicted with syphilis, unless made with knowledge of this condition. As the evidence was conclusive, no prejudice could have resulted from adding the qualifying clause. See, as bearing on this subject, *Trammell v. Vaughan*, 158 Mo. 214 (59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302); *Allen v. Baker*, 86 N. C. 91 (41 Am. Rep. 444); *Shackleford v. Hamilton*, 93 Ky. 80 (19 S. W. 5, 15 L. R. A. 531, 40 Am. St. Rep. 166); *Grover v. Zook*, 44 Wash. 489 (87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012); *Gring v. Lerch*, 112 Pa. 244 (3 Atl. 841, 56 Am. Rep. 314); *Goddard v. Wescott*, 82 Mich. 180 (46 N. W. 242). See *Vierling v. Binder*, 113 Iowa, 337. Most of the cases deal with a situation in which disease is pleaded as an excuse or justification for nonperformance of the contract by one party when demanded by the other. But in *Grover v. Zook*, 44 Wash. 489 (87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012), the defendant was relieved of his promise to marry an incurable consumptive on the ground of public policy; and it is held in several jurisdictions that the fact that a spouse is afflicted with syphilis when married which is incurable, or of which there is but a remote probability of effecting a cure, is good cause for annulling a marriage on the ground of fraud. These rulings are in harmony with the instruction of the court that, in event plaintiff was not cured, defendant was

under no obligation to perform; but the evidence is in conflict as to whether permanent recovery from the disease in its secondary stage ever can be effected. The physicians agree that it may be controlled, but some of them insist that it is a constitutional disorder which is likely to be transmitted to offspring, and may break out again on the person afflicted, even after the lapse of fifty years. There can be no doubt but that the curability of the disease is matter of grave doubt in the medical profession; and were we confronted with the proposition as to whether one who has become afflicted therewith may complain of a breach of a previous promise of marriage at least when made in ignorance of the malady, we should hesitate long before so holding. The point, however, is not saved in this record.

True, the third division of the answer pleaded on knowledge and belief that the plaintiff "was not, and is not now, in physical condition, by reason of disease, to fulfill the duties of wife or mother, and that she should not marry, and defendant pleads said condition of plaintiff as a bar to this suit."

8. SAME: plead-  
ings: issues:  
instructions.

The times alluded to are not indicated, save when the answer was filed and some previous date. Did the pleader intend that the latter was at the time of the alleged breach? Or was this purposely left indefinite? In any event, appellant is not in a situation to complain if the court accepted his own interpretation of the answer. This appears in the first and third instructions requested. The former reads: "In case the defendant pleads as a bar that the plaintiff at the time of the alleged breach and up to the time of the bringing of this suit was suffering from syphilis or some venereal disease which unfitted her from being a wife or mother. If said defendant has by a preponderance of the evidence shown that plaintiff was in 1904 suffering from syphilis or some venereal disease, and that she was still suffering from said disease at the time of the alleged breach of contract, then I instruct you

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that the plaintiff can not recover in this case." Again, in the third paragraph, the court was requested to instruct the jury, in substance, that, if plaintiff was afflicted as alleged in 1904, she must be found to have continued in that condition in 1906, for that the evidence showed the disease to be incurable. No evidence tending to prove her to have been unchaste with any other than defendant, was introduced, and so, after thus interpreting the pleadings, appellant ought not to be heard to complain because the court adopted such interpretation in the instruction given.

VI. The plaintiff testified that, shortly after the engagement in 1903, she was induced by reason thereof to indulge defendant in sexual intercourse, and that this was continued until the spring of 1905. The court instructed the jury that, as this had not been pleaded in aggravation of damages, it could not be considered for that purpose, but was a circumstance, if found to be true, "tending to show a matrimonial engagement between them," and should be given "such weight as you believe it fairly entitled to, in connection with other facts and circumstances proven in the case with reference to the existence of said alleged agreement of marriage." It is conceded that the rule as stated finds express approval in *McConahey v. Griffey*, 82 Iowa, 564, which was cited with apparent approval in *Herriman v. Layman*, 118 Iowa, 590, but cases to the contrary from other States are relied on, with insistence that the above decisions are erroneous, and should be overruled. See *Wrynn v. Downey*, 27 R. I. 454 (63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63); *Felger v. Etzell*, 75 Ind. 418. It is a universal rule that in actions of this kind the conduct of the parties towards each other during the alleged engagement may be shown in evidence as an aid to the jury in determining whether such engagement in fact existed, and sexual intimacy would seem to be so



closely related to the marital relation as that indulgence in sexual intercourse would be a circumstance to be considered in connection with others. As observed in *McConahey v. Griffey*, women are more likely to surrender their chastity under the influence of a promise of marriage than otherwise, and the rule therein announced no more than recognizes such established fact and allows such weight to be given thereto as the jury in the circumstances of the case believe it entitled to. This does not involve the thought that such misconduct is an ordinary or usual incident of betrothal. It is no more than a full application of the rule that mutual conduct of the parties during the period of alleged betrothal may be fully proven, and that, if this includes sexual intercourse, it is more likely than otherwise to be attributable to the alleged engagement, and therefore to be considered as a circumstance bearing upon the question as to whether there has ever been a promise to marry. It must be conceded that the weight to be accorded this circumstance is not very considerable, and, were the point *res integra*, the writer would doubt the propriety of the rule. As it has long stood, and has support in other jurisdictions, however, we are not inclined to disturb it.

VII. The defendant moved to exclude the testimony of plaintiff concerning sexual intercourse because she was uncorroborated. The motion was rightly overruled. Corroboration is only required in the prosecution for seduction as a crime, and not in a civil action for damages. See *Welch v. Jugenheimer*, 56 Iowa, 11.

10. SAME:  
corroboration.

It also appears that plaintiff testified on cross-examination that she had no sores on her body, except a boil on her shoulder and another on her wrist, when she went to the hospital in March, 1904. She was then asked if she was afflicted with any other malady, and also whether the physician in

11. EVIDENCE:  
cross-examination.

attendance informed her with what malady she was afflicted. The objection as not cross-examination was sustained, and rightly so. The subject had not been broached in the direct examination, and as it related to a matter of defense necessarily to be pleaded to be available, the ruling was correct. *Vierling v. Binder*, 113 Iowa, 337. If *Goddard v. Westcott*, 82 Mich. 180 (46 N. W. 243), announces a different doctrine, it does not have our approval.

VIII. Several instructions are criticised and among them the thirteenth. It told the jury, in substance, that mere opportunity to have sexual intercourse would not

warrant a finding that it occurred, nor  
12. SAME: illicit  
intercourse:  
evidence. would it be enough as corroborative evidence

to establish the same if the parties were equally credible as witnesses, but that it might be considered, in connection with all the other evidence, in determining whether the parties had indulged in illicit intercourse. We see no objection to this instruction. The parties were the only witnesses on this subject, the plaintiff affirming and the defendant denying, and, if they were equally credible, the effect of the instruction was to say that proof of opportunity would not warrant a finding that there was such intercourse. As applied to the facts of the case, this was correct. Even though proof of opportunity is not corroborative evidence tending to connect defendant with the commission of the offense, under the statute, it is proper to be considered in connection with other evidence in determining whether there was indulgence such as she testified to. Manifestly without opportunity this could not happen.

Again, it is said that the fifth instruction permits the jury to consider self-serving declarations. If this be conceded, there was no evidence of such declarations introduced.

The eleventh instruction allowed the jury to consider in measuring the damages the intimacy of the parties and

defendant's conduct toward plaintiff, and it is said that this permitted the consideration of the illicit intercourse. Possibly this might have been so had not the court expressly directed the jurors in another instruction not to allow any damages because of that relation. The instructions are to be read together, and, when this is done, the criticism mentioned is fully met.

IX. The defendant pleaded that the plaintiff had become ill tempered and at one time had declared that she hated defendant and his children as mitigating circumstances. The court in instructing the jury did not specifically refer to this plea, but did advise the jury to take into consideration the degree of intimacy existing between the parties, and all injuries sustained by plaintiff, including loss of blighted affections and disappointment, hopes, and the like. If the plaintiff said what she is contended to have said, her affections could not have been as great as otherwise, and would be less likely to be injured or blighted by the breach. While the attention of the jury might well have been directed to this special plea, yet it was of a nature such as could scarcely have been overlooked, and, in the absence of a request, we are not inclined to hold that it was error to omit a more specific reference thereto.

X. Some other rulings are complained of, but they are not of such a character as to require discussion. It is urged that counsel for the plaintiff used inflammatory language in his argument to the jury; while appellee insists there was warrant for what he is alleged to have said in the argument of counsel for the defendant. We do not determine the merits of this controversy, for no objection whatever appears to have been made, and, in the absence of any objection to the language employed, error can not be assigned. *Gorham v. Sioux City Stockyards Co.*, 118 Iowa, 749.

13. SAME:  
damages:  
instruction.

14. SUBMISSION  
OF ISSUES.

15. MISCONDUCT  
IN ARGUMENT.

Counsel for appellant suggest that the judge was out of the room, but no showing was made to that effect, in the absence of which we are bound to presume his continued presence throughout the trial. *State v. Carnagy*, 106 Iowa, 483. Moreover, it is doubtful whether the evidence of alleged misconduct is properly preserved. *Kinney v. McFaul*, 122 Iowa, 452. A majority of the members of the court are of the opinion that the damages allowed are not excessive.

The judgment is *affirmed*.

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JOHN J. ANDRE, Appellee, v. THE CITY OF BURLINGTON,  
IOWA, Appellant.

141	65
144	629

**Municipal improvements: SPECIAL ASSESSMENTS: OBJECTIONS.** Where

1 an abutting property owner appears before the city council pursuant to notice, and files objections to the proposed special assessment of his property for public improvement because of errors, irregularities or inequalities therein, he is thereafter limited to the objections thus made, except where fraud is shown or the question of jurisdiction is involved; and the defects complained of must be definitely pointed out.

**Same: NOTICE: WAIVER OF DEFECTS.** Defects or irregularities in the  
2 notice of intention to construct a sewer are waived by appearance in response thereto.

**Special assessments: BENEFITS.** It will be presumed on appeal that  
3 a special assessment was made on the basis of benefits, and the method employed by the council in so doing is not material; it may be arrived at according to the area of the abutting property,

**Same.** Although a special assessment for benefits is arbitrary and  
4 without reference to the benefits to certain property, it is not ground for setting the entire assessment aside as invalid for that reason, but the error should be corrected.

**Same.** Where no fraud is shown the finding of the council with  
5 reference to benefits, which omits certain property from an assessment for good cause, should not be disturbed.

**Construction of sewers: STREET INTERSECTIONS, ETC.: ASSESSMENT OF**  
VOL. 141 IA.—5

6 COST. The cost of constructing a sewer at street intersections, manholes and catch basins, may be charged to abutting property, even though put in for drainage purposes and to take the water from the streets, especially where the abutting property is also drained.

7 **Same:** RESOLUTION OF NECESSITY: OBJECTIONS: WAIVER. Failure of the resolution of necessity to describe adjacent property to be assessed is a mere error, irregularity or defect, which is waived by omission to make objection thereto before the council.

*Appeal from Des Moines District Court.*—HON. W. S. WITHROW, Judge.

TUESDAY, OCTOBER 27, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

APPEAL from the decision of the district court, upon an appeal from the action of the city council of the defendant, in levying a special assessment against plaintiff's property for the construction of a sewer in a street or alley abutting said property.—*Reversed and remanded.*

*E. L. Hirsch*, for appellant city.

*La Monte Cowles*, for appellee.

DEEMER, J.—Pursuant to a resolution of necessity duly passed, and of other proceedings, some of which will be presently noticed, the city council of the city of Burlington laid a sewer in some of the streets and alleys of the city, and attempted to levy the cost thereof against abutting property. Within the time provided by law plaintiff appeared before the city council, and filed a protest and objections against the proposed assessment of \$130.-81 upon his property, and gave the following as his grounds therefor: "First. No legal notice was given by

the city of its intention to construct said sewer. Second. No legal contract was made for the construction of said sewer. Third. The assessment was not levied according to law, and is illegal and void. Fourth. Said assessment is arbitrary, and not based upon any actual or supposed benefits to the property. Fifth. Said assessment is in excess of twenty-five percent (25 percent) of the actual value of said property. Sixth. Said assessment is illegal and void because a large portion of the property adjoining said sewer was not assessed, but the whole of the assessment was levied upon only a portion of the property adjacent to the sewer, arbitrarily and illegally. Seventh. Because the entire costs of the sewer has been levied to only a portion of the property abutting thereon, thus causing the owners of the property who were assessed, including complainant, to pay, not only their proportion of the costs of the sewer, but the proportion of the property not taxed or assessed, and also because there has been assessed and charged to the abutting property the costs of construction of the sewer at the street intersections, the costs of catch basins, and other work properly chargeable to the city at large, and not to the abutting property, the same having been put in for the benefit of property other than that assessed, and for the drainage of the streets and alleys of the city of Burlington generally. Eighth. Because said assessment is contrary to the laws of the State and to the ordinances of the city of Burlington, Iowa." This protest and these objections were disregarded, and the proposed assessment was confirmed and established. Plaintiff thereupon appealed to the district court, and upon a hearing there the action of the city council was reversed, and the entire assessment was declared null and void for want of power, on the part of the city council, to assess the same against the property. The assessment was annulled, and the defendant city ordered to cancel the same. The appeal is from this decision of the district court.

Sections 823, 824 and 825 of the Code provide for notice to the owner of a proposed assessment, for the time of filing objections thereto; state the effect of the objections filed, and provide for the final assess-

1. MUNICIPAL  
IMPROVEMENT:  
special assess-  
ments: ob-  
jections.

ment. The notice to the owner of the proposed assessment must be for a certain time, and the statute fixes the time for the filing of objections thereto on account of errors, irregularities, or inequalities in the assessment, and by section 824 it is expressly provided that "all objections to errors, irregularities or inequalities in the making of the assessment or in any of the prior proceedings or notices not made before the council at the time and in the manner provided shall be waived except where fraud is shown." But for the inference sought to be drawn from some of our previous cases it would seem that, except in case of entire want of jurisdiction, the only remedy a property owner has against a special assessment is under these sections of the Code. Without reviewing those cases, or pointing out wherein the inference sought to be drawn is faulty and unsupported, save perhaps in one or two instances, it is sufficient to say that, where the property owner does appear before the city council pursuant to notice from the city, as plaintiff did in this case, and files objections to the proceedings of the council, he is limited, both upon his appeal to the district court, and upon appeal here, to such objections as he filed with the city council, save where fraud is shown. There is no claim of any fraud in the instant case, and the exception noted need not be considered. It may, perhaps, be true that objections to the jurisdiction of the city council and of the district court may be raised at any time, even upon appeal to this court. But if there be such an exception, it must clearly appear that the city council was without jurisdiction to make the improvement. This means something more than errors, irregularities, or inequalities in the making of the assessment and in the prior

proceedings and notices. Aside from the jurisdictional question, it is manifest that plaintiff must be confined to the objections made by him before the city council.

The arguments filed cover a much broader field, but we shall only consider such objections as were lodged with the council. Going to these, it will be discovered that the fifth, sixth and seventh objections go to the amount rather than the legality of the assessment, and the eighth is too indefinite to be considered. The first, second and fourth objections have reference to the illegality of the contract for the improvement and the character of the assessment. The third is too general to point out any defect. *Light & Power Co. v. Marshalltown*, 127 Iowa, 644; *Owens v. Marion*, 127 Iowa, 469.

No objection was made to the resolution of intention or of necessity, and we shall not consider the sufficiency thereof, although that proposition is argued in appellee's brief. As to the notice of intention to construct the sewer, it appears that plaintiff appeared in response to the notice, and made certain objections to the proposed sewer. Although the notice may have been defective, it accomplished its purpose, and plaintiff was in no manner prejudiced by reason of any defects therein. It is not a case of no notice, but of a defective one. And these defects were waived by plaintiff's appearance in response thereto. *Reed v. City*, 137 Iowa, 107; *MacKay v. Hancock County*, 137 Iowa, 88.

The legality of the contract is challenged, but no specific objections were pointed out in the protest filed, and counsel do not point out any defects in the contract in their printed brief. The statute does not specify any particular form of contract, and we discover nothing in it which would make it illegal.

The objection is that the assessment was arbitrary, and without reference to any supposed or actual benefits to the

2. SAME: notice:  
waiver  
of defects.



property. The record does not sustain this proposition. In the first place it will be presumed that the council did its duty, and assessed according to benefits. Just how it arrived at its conclusions is now immaterial. But the evidence shows that the assessment was based upon a report of the engineer, and that he arrived at the question of benefits by assessing according to the area of the abutting property; that is to say, at the rate of one cent per square foot. The front-foot rule has been held a proper basis for assessment, although in a measure arbitrary; and if that be unobjectionable, surely the area rule should be sustained.

Moreover, there is no doubt under the testimony that plaintiff's property was benefited to some extent by the sewer. But if there be anything in this point, it was no ground for declaring the entire assessment invalid. The trial court should have corrected the assessment, and it was in error in declaring it invalid on this ground. The fifth objection does not go to the validity of the assessment as a whole. We shall refer to that later.

The sixth relates to the manner of the assessment. It is claimed that some of the property abutting upon the sewer was arbitrarily omitted from the assessment. It is true that some of the lots were omitted, but this was because they had once been assessed for the same purpose, or for some other reason which appeared valid to the council. Their omission upon this ground should not destroy the assessment. It merely adds confirmation to the fact already found that the assessment was according to benefits. No fraud is claimed, and the finding of the council with reference to benefits should not be disturbed, because certain abutting property was relieved from assessment.

The seventh objection is compound. As we understand it, the points made against the assessment not already re-

ferred to are, that the assessment was illegal because it included the cost of the construction of the sewer at street intersections, the cost of catch basins and other work, properly chargeable to the city at large, and not to the abutting property. Section 819 of the Code expressly provides that the cost of a sewer at street intersections may be taxed to abutting property, and it is too clear for argument that the cost of proper manholes and catch basins may be included in the assessment. They are, as every one knows, essential to the proper construction of any system of sewers. The city is not obligated to take care of the cost of these. *Comstock v. Eagle Grove*, 133 Iowa, 593; *Owens v. Marion*, 127 Iowa, 475. The only contention made before the city council with reference to these catch basins is found in the seventh paragraph of the objections filed. Manifestly the expense of these was not chargeable to the city. Even if they were put in for drainage purposes, and to take water from the streets, the expense was not necessarily chargeable to the city. The one near plaintiff's property not only drained the abutting streets, but of necessity took care of the water coming from his lots. This answers all the objections made before the city council, and practically settles every question, save the amount of the assessment which should be levied against plaintiff's property.

The trial court, however, was of the opinion, so it is claimed, that the proceedings were void because the resolution of necessity did not mention or describe any of the adjacent property to be assessed. Section 810 of the Code provides that the resolution shall state whether abutting property will be assessed. The resolution in the instant case did recite that the cost of the improvement would be assessed against adjacent and abutting property in proportion to benefits. The assessments were made against abutting

6. CONSTRUCTION  
OF SEWERS:  
street inter-  
sections, etc.:  
assessment  
of cost.

7. SAME:  
resolution  
of necessity:  
objections:  
waiver.

property. Plaintiff appeared before the council, and objected to the construction of the sewer, and also appeared in response to the notice of the proposed assessment, and on none of these occasions did he make the objection that adjacent property was omitted from the assessment. This was nothing more than an error, irregularity, or defect in the proceedings which was waived by plaintiff's failure to object. See Code, section 824; *M. & St. L. R. R. v. Lindquist*, 119 Iowa, 144; *Nixon v. City of Burlington*, 141 Iowa, 316; *MacKay v. Hancock Co.*, 137 Iowa, 88; *Reed v. City*, 137 Iowa, 107, and cases cited. In *Stutsman v. Burlington*, 127 Iowa, 563, the identical question now under consideration was determined adversely to plaintiff's contention. Failure to assess adjacent as well as abutting property was not jurisdictional. At most it was a mere error or irregularity, and the defect, if there was one, was waived by plaintiff because he did not make that a ground of objection. None of his objections challenged the resolution of necessity.

Appellee's argument covers a much broader field than his objections filed before the city council. He relies on defects in the resolution of necessity, insufficient notice of proposal for bids, change of plans by the city engineer after the contract was let, and some other matters, which it is claimed deprived the city council of jurisdiction, or of power to act at all. None of these matters were raised by the objections filed, and manifestly they can not be considered on this appeal. If the action were in equity, and not upon appeal, or were it an independent suit to set aside or enjoin the tax, we might have some difficulty with the case. The members of this court are not agreed upon what constitutes a jurisdictional defect. In the opinion of the writer none of the matters last referred to are jurisdictional; and if they were, it is not a case where nothing was done, but at most an error, defect, or irregularity occurring after the council had acquired complete jurisdic-

tion, which might have been raised upon appeal, but which was not in fact done. It is true that in some of our cases a majority of the court has held that a defect in the notice of proposal for bids is jurisdictional. *Bennett v. Emmetsburg*, 138 Iowa, 67, and cases cited; *Comstock v. Eagle Grove*, 133 Iowa, 599. Those cases in the opinion of the writer run counter to many of the cases heretofore cited in this opinion. They were all based upon an uncontrovertible proposition of law, but in my opinion the application of it was erroneous. As such proceedings are *in invitum* the statutes must be strictly followed, or the acts done will be invalid. But it is within the power of the Legislature to establish tribunals for the settlement of all issues arising during the progress of the proceedings, and to these tribunals the aggrieved party must resort. Of course, if the council by reason of some act or omission is without jurisdiction—that is to say, has no power to act at all in the premises—the question may be raised at any time and in any kind of proceedings. None of the matters relied upon are, in the opinion of the writer, jurisdictional. But if it may be said that they were, we are all agreed that when the property owner appears before the council and files his objections, he is bound thereby, and can not on appeal raise other questions not presented to the city council and not urged before the trial court. Claim is made that these matters were presented to the trial court and passed upon by it. The record does not sustain the claim. But if it did, there was no proper objection before that court, and none here upon which we are justified in passing. See cases heretofore cited, and, particularly, *MacKay v. Hancock County*, 137 Iowa, 88; *Stutsman v. Burlington*, 127 Iowa, 563, and *Nixon v. Burlington*, 141 Iowa, 316.

With reference to the amount of the assessment, we are of opinion that it was too high. Plaintiff's property was worth, in our opinion, \$250. By statute it was not

assessable for more than one-fourth of that value. Code Supp. 1902, section 792. The assessment should have been reduced to \$62.50.

The case will be reversed and remanded for a decree in harmony with this opinion.

*Reversed and remanded.*

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PARN KIRKPATRICK, Appellee, v. AETNA LIFE INSURANCE COMPANY, Appellant.

**Appeal:** EVIDENCE: PRESUMPTION. In so far as there is a conflict in  
1 the evidence the version of the successful party will be taken as true on the appeal.

**Insurance:** CONSTRUCTION OF POLICY. In the construction of an insur-  
2 ance policy it will be given an interpretation most favorable to the insured.

**Accident insurance:** SELF INFLICTED INJURY: PRESUMPTION: BURDEN  
3 OF PROOF. In a suit upon an accident policy exempting the insurer from liability for self inflicted injuries, it will not be presumed that the injuries were self inflicted; or, under the facts of the instant case, that they were other than accidental; but the burden is upon the insurer to show its nonliability on this ground.

**Accident insurance:** CONSTRUCTION OF POLICY. An insured attempted  
4 to pass over a platform and thus through a train while standing across a public street, and when alighting a sudden jerk of the car threw him to the ground and while in that position one of his arms was run over. *Held*, not to present a state of facts within the provisions of an accident policy absolving the company from liability for injury while entering, or trying to enter, or leaving a moving car, or while at a place in or upon a railway or other conveyance not provided for the use of passengers during transit; as the plaintiff was not a passenger, and the jury found he was not entering or leaving, or trying to enter or leave a moving train.

**Same:** CAUSE OF INJURY. Even though insured was at a place where  
5 he was not permitted to be under the terms of his policy, to defeat recovery it was necessary for the insurer to show some causal relation between that fact and the injury.

**Same:** INSTRUCTIONS. Refusal to charge that if the injury resulted 6 from plaintiff's act in leaving a moving conveyance the verdict should be for defendant was not erroneous, where it did not plead exemption from liability because plaintiff was on the platform of the car and in a place not provided for passengers during transit, and that such act contributed to the injury.

*Appeal from Poweshiek District Court.*—HON. BYRON W. PRESTON, Judge.

FRIDAY, OCTOBER 30, 1908.

REHEARING DENIED TUESDAY, JANUARY 26, 1909.

ACTION upon a policy of accident insurance. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

*Carr, Hewitt, Parker & Wright, J. P. Lyman and W. C. Rayburn, for appellant.*

*Norris & Norris and W. R. Lewis, for appellee.*

DEEMER, J.—The policy of insurance issued by defendant to plaintiff on or about January 22, 1906, covered death or injuries to plaintiff through external, violent and accidental means, and, among other things, contained these provisions and conditions:

If injuries are sustained by means as aforesaid (1) while the insured is riding as a passenger and being actually in or upon any railway passenger car using steam, cable or electricity, as a motive power, or (2) while riding in a regular passenger elevator, or (3) while traveling as a passenger and on board a steam vessel of any regular line for the transportation of passengers, or (4) in consequence of the burning of a building in which the insured shall be at the commencement of the fire, the amount to be paid shall be double the sum specified in the section

under which claim is made, subject to all the conditions of this policy. This insurance does not cover disappearance nor suicide; nor in the event of accident or death, loss of limb, or sight or disability resulting, wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form; nor from sleep walking, medical or surgical treatment, war, or violating the law; nor from injuries intentionally inflicted upon the insured by himself; nor does it cover (except as incident to occupation of railway employees) entering or trying to enter or leave moving conveyances using steam or electricity as motive power (except cable and electric street cars) being in any place in or on such conveyance which has not been provided for the occupation of passengers during transit, or being upon any railroad bridge or right of way, except at established crossings of such roads with public highways. Section 9 above shall not apply to accidents happening while the insured is boarding or alighting from, or is upon the steps of any public conveyance referred to herein.

Plaintiff claims that he accidentally lost his arm between the wrist and elbow while attempting to pass through a train in the city of Grinnell, and his account of how it occurred is substantially as follows: He says that a train on the Iowa Central Railway Company came into the city of Grinnell, and stopped at its depot in that city, where it was to wait for something like twenty minutes while its passengers took supper; that this train stood over and across a public street, along and over which plaintiff desired to pass; that, in order to reach his destination, he mounted one of the platforms of a car which made up the train, went to the steps on the other side, and that while he was in the act of alighting, with one hand ahold of an iron handhold on the car and one foot upon or nearly upon the ground, the train suddenly started backward, throwing him to the ground with one arm across a rail of the track, resulting in a car wheel passing over the same, and inflicting the injuries of which he complains. Defendant claimed that the insurance was fraudulently obtained,

that the injuries were self inflicted, and that as plaintiff was injured while leaving a moving conveyance using steam as a motive power, and lost his arm while at a place on such conveyance which had not been provided for the occupation of passengers during transit, plaintiff could not recover. The case was submitted to a jury under these issues, resulting in a verdict for plaintiff.

Several propositions are relied upon for a reversal, and, in the discussion of such as are deemed controlling, it must be remembered that, in so far as there was a conflict in the testimony, plaintiff's version of the affair must be treated as the truthful one, and that theory of the case most favorable to him must be accepted. For this reason, we must assume that plaintiff at the time he received his injuries was not violating the law in attempting to alight from a moving train.

1. APPEAL:  
evidence:  
presumption.

Moreover, in construing the policy of insurance, we must give it that interpretation most favorable to plaintiff, for the oft-repeated reason that defendant selected its own language in writing its policy, and, if there be doubt or ambiguity in its construction, it must be resolved in plaintiff's favor.

2. INSURANCE:  
construction  
of policy.

Again, it will not be presumed that the injuries were self-inflicted, or that under the facts shown they were otherwise than accidental. So that we must find that plaintiff's version is correct, and that the injuries were accidental. The burden was upon the defendant to show that they were self-inflicted, or that it is not liable because of some condition of its policy. *Sutherland v. Insurance Co.*, 87 Iowa, 505, *Jones v. Accident Ass'n*, 92 Iowa, 652; *Prader v. Accident Ass'n*, 95 Iowa, 149; *Goodwin v. Provident Co.*, 97 Iowa, 226.

3. ACCIDENT IN-  
SURANCE: self-  
inflicted in-  
jury: presump-  
tion: burden  
of proof.

The main proposition relied upon by defendant for a reversal may best be presented by copying an instruction



asked by it, which reads as follows: "If you find from the evidence that the injury sustained by plaintiff and for which he seeks to recover resulted, wholly or partly, directly or indirectly, from the act of plaintiff in leaving a moving conveyance using steam as a motive power, then and in the event you so find, your verdict should be for the defendant";—and a consideration of an instruction given by the court, which reads in this wise: "You are further instructed, however, as to the matter referred to in the last instruction, that if at the time or just before plaintiff was hurt he went upon the platform of the car in question for the purpose of crossing over the platform, and that the car was not then in motion, and while on the platform, or on the steps thereof, there was a movement of the train and car which jerked or threw plaintiff off, and caused his arm to go under the wheels, and that it was not the purpose of the plaintiff to get off the car while in motion, then and in that event it could not be said that he was getting off a car in motion. Or if you find from the evidence that the plaintiff in crossing or attempting to cross the platform of the car in question, stepped off the platform or steps, and had one or both feet on the ground, or was in the act of alighting, and was off the car before the same was in motion, or so far off when the movement of the car began as that he could not recover himself and prevent getting off, then and in that event plaintiff could not be held to be getting off a car in motion. Before plaintiff can be said to have been getting off a car in motion, it must appear that it was plaintiff's intention and purpose to get off when the car was in motion, and he must have so gotten off." As already intimated, we must hold, in view of the verdict returned, that plaintiff was not attempting to alight from a moving train.

But defendant's counsel contend with much plausibility that the instruction asked should have been given,

and that plaintiff was not entitled to recover, for the reason that he was injured by reason of his leaving a moving conveyance using steam as a motive power, and as a result of his being in a place on such conveyance which had not been provided for the occupation of passengers during transit, to wit, upon the platform of a coach. In this connection it must be remembered that plaintiff was not a passenger upon the railway train, nor was he at the time he attempted to alight upon a moving conveyance. According to his version, he was passing through the train which blocked a public street, and the train was not moving when he attempted to get off the platform. The burden was upon the defendant to show that plaintiff was violating the conditions of the policy at the time he was injured. Defendant's contention calls for a construction of the language of the policy creating these conditions. Its counsel say that these cover plaintiff's presence upon the steps or platform of the railway coach without reference to whether the train was moving or standing still. Remembering the rule already announced for the construction of life or accident insurance policies, we now go directly to these conditions, and, after a careful consideration of the same, are constrained to hold that, as applied to the facts of this case, defendant's contention can not be sustained. Plaintiff was not, according to the finding of the jury, entering or trying to enter or leaving or trying to leave a moving conveyance using steam as a motive power. It is true that just before his injury he was upon the platform or steps of a car which were not provided for the occupation of passengers during transit; but he was not in that place or upon such conveyance when injured. The manifest thought of these conditions is to absolve the defendant from liability when the assured is entering or trying to enter or to leave a moving conveyance, or while he was at the time of injury at a place in or upon a railway or other conveyance not provided for the use of passengers

during transit. The policy was intended to cover accidents resulting to passengers upon moving trains except when boarding or alighting from or upon the steps of the conveyance, and to all others save when they are in a place in or on such conveyance not provided for the occupation of passengers during transit. A consideration of the whole of these conditions leads to the conclusion that defendant is liable unless plaintiff's injuries were received while he was entering, or attempting to enter or to leave, a moving conveyance, or while he was in a place in or upon the car not provided for the use of passengers during transit.

Conceding arguendo that plaintiff had been at a place upon the car not provided for passengers during transit, to wit, upon the platform or steps, he was not when injured in that position. As to passengers,

4. ACCIDENT  
INSURANCE:  
construction  
of policy.

the proper construction of the conditions of the policy no doubt is that it does not cover accidents while they are boarding or alighting from trains or upon the steps of a coach; and, as to those who are not passengers, it does not cover accidents while they are entering or trying to enter or to leave moving trains, or while in a place in or on such conveyance not provided for passengers during transit. The steps and platforms of passenger cars are provided for passengers when they are not in motion, affording ingress and egress thereto and therefrom, and being upon the platform or steps is not necessarily at a place where passengers have no right to be during transit.

Conceding arguendo that plaintiff had been at a place where by the terms of the policy he was not permitted to be, and where had he been injured there would have been no right of recovery, still it would be necessary for defendant to show some causal relation between this fact and the injury which he received. *Jones v. Accident Ass'n, supra.* Had the

5. SAME: cause  
of injury.

train remained standing, the injury could not possibly have been received. The immediate cause of the injury was the moving car wheel passing over plaintiff's arm, and the more remote, yet still the proximate, cause was the sudden jerk of the train. True, the accident might not have happened had plaintiff not been upon the steps of the car. Nor would it have happened had the train not been across the street, but these latter matters were conditions rather than causes, and they are not the conditions referred to in the policy in suit. The conditions in the policy have reference to two things: First, plaintiff's conscious act in entering or attempting to enter, or to leave a moving conveyance; and, second, his being at a forbidden place when injured, to wit, upon the steps or platform of a railway coach. This is the only fair construction which can be placed upon the policy, and, if plaintiff was not at the forbidden place when injured, the fact that he had been there at some other period is not material to this phase of the case. Take the *Jones* case, *supra*, as an example. There the assured was violating the law, and he would not have been shot had he not been at a house of ill fame for immoral purposes. He was shot while there, but there was no such causative connection between the shooting and his violation of the law as prevented recovery. So in this case the provision of the policy covers an injury received at a certain place; and the proof, in order to defeat recovery, must show that plaintiff was at that forbidden place when injured.

As a further and conclusive answer to the argument of defendant's counsel, it should be said that nowhere in its answer does it plead that it is absolved from liability

6. SAME: because plaintiff had been at a place upon  
instructions. the car where passengers had no right to be during transit, and that this either directly or indirectly caused or contributed to his injury. The proposition now presented seems to be an afterthought, and might well be ig-

nored in our consideration of the case. At any rate, the trial court did not err in refusing defendant's request for an instruction with reference to this matter. We are not, of course, to discuss the merits of the case or to pass judgment upon plaintiff's right to recover. These were questions for the jury, and with its finding the parties must be content.

We find no prejudicial error; and the judgment must be, and it is, *affirmed*.

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JOSEPH J. DOUDA V. CHICAGO, ROCK ISLAND & PACIFIC  
RAILWAY COMPANY, Appellant.

**Railways: INJURY TO EMPLOYEE: NEGLIGENCE: SUBMISSION OF ISSUES.**

- 1 Where there was no evidence of any defects in a railway engine causing it to move without an application of steam, or that the company had reason to apprehend such an occurrence, and nothing to charge operators of the engine with knowledge of such defects, an instruction authorizing recovery for injury to an employee caused by its unexpected movement, while cleaning clinkers from the firebox, should not have been given.

**Same: NEGLIGENCE: EVIDENCE.** The movement of a railway engine

- 2 without an application of steam by the engineer is so improbable that the fact of its movement is some evidence that the person in charge was responsible therefor; and, taken in connection with the testimony of one injured thereby that the engineer at the time acknowledged adjusting the lever, which was competent as part of the *res gestae*, was sufficient to take the issue of negligence in that respect to the jury, although the engineer gave a different version of the conversation.

**Same: LAST FAIR CHANCE.** Where there was no evidence that the

- 3 engineer might have avoided the injury by exercise of diligence after discovering plaintiff's peril, the result of his contributory negligence, the issue involving the doctrine of the last fair chance ought to have been submitted.

**Same: SETTLEMENT: FRAUD: EVIDENCE.** Under a plea that an employee's

- 4 settlement of a claim for personal injury was procured by fraud, evidence that he and the members of his family present at the

trial were unable to read English was admissible, to show that the employee did not know the contents of the release and that the same was misrepresented to him.

**Same.** The statement of a claim agent in making settlement with an injured employee that he understood from the employee's physician that he would recover within a specified time is merely an expression of opinion, and will not justify setting aside the settlement on the ground of fraud; especially where the employee had the advice of his own physician and it did not appear that he relied upon the agents statement.

*Appeal from Linn District Court.*—HON. J. H. PRESTON, Judge.

TUESDAY, JANUARY 26, 1909.

ACTION to recover damages for personal injuries sustained by plaintiff while in the employ of defendant. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

*Carroll Wright, J. L. Parrish and Grimm, Trewin & Moffitt, for appellant.*

*Barnes & Chamberlain and S. K. Tracy, for appellee.*

LADD, J.—Plaintiff's employment at the time of his injury was that of cleaning out clinkers from the fire boxes of defendant's engines in its roundhouse at Cedar Rapids. The usual method of performing this work was to drop the "dump" by means of a bar from outside the wheels of the engine while it was standing over the ash pit, and to replace the dumping mechanism in the same way. But in this particular instance the plaintiff thought it necessary to crawl under the engine into the ash pit in order to close the dump. He advised the "hostler" in charge of the engine, who was in the engineer's cab, of his intention to go under, having had the engine moved to

what he considered a proper place for that purpose, and then proceeded to crawl, feet first, through the narrow opening between the drive wheels and above the side bar or connecting rod. When his body was part way through, the engine moved backwards, and the consequent rising of the side bar pinched or crushed the plaintiff, causing the injuries of which he complains. There was a question under the evidence as to whether plaintiff was not guilty of contributory negligence in attempting to go under the engine at all, or in attempting to go under it in the manner above described, but there is no complaint as to the instructions with reference to contributory negligence, and that feature of the case may be passed without further notice.

The defendant is alleged to have been negligent in two respects: (1) In that its hostler in charge of the engine, with knowledge that plaintiff was under it, without

1. RAILWAYS:  
injury to em-  
ployee: negli-  
gence: sub-  
mission of  
issues.

warning him started, moved, or permitted the engine to move; and (2) the engine was unsafe and defective, in that it would start forward without the lever being moved or steam being turned on or any action of the person in charge, and defendant, knowing this and plaintiff's position, took no precaution to prevent this, but allowed the engine to move, and thereby injure him. The evidence failed to point out any defect in the engine, or that it had ever started before without steam being turned on, or that defendant had any reason to anticipate such an occurrence. Nevertheless the jury was instructed that if they found "that said locomotive was unsafe and defective, in that it would start after being stopped without moving the lever therefor or turning on the steam for the purpose of starting it, and that it would with the knowledge of defendant or its employes in charge thereof start without any action on the part of those in charge thereof, and the defendant took no precaution or safeguards to prevent its said movements,

and that said locomotive was by reason thereof and the careless and negligent acts of the person in charge thereof, without notice or warning or signal to the plaintiff, started and permitted to run upon the body of plaintiff while under said engine and doing said work, and that by reason thereof plaintiff was injured," then, if such injuries were without fault of plaintiff contributing thereto, plaintiff was entitled to recover. Even though this instruction be conceded to be correct in the abstract, the evidence was not such as to authorize it. There was nothing in the record to charge the employees operating the engine with knowledge of any defect therein or to indicate any information concerning it on defendant's part. Even if the engine be conceded to have been defective, this was not shown to have been apparent or discoverable on reasonable inspection, nor does it appear from the evidence that the defect had existed prior to that night, or that defendant was negligent in failing to discover and repair it or in using it in the condition it was in. So that, even though it might be inferred from the moving of this locomotive engine without the application of steam or other agency, if it did so move, that it was then out of repair, there is no basis in the evidence on which to found a charge of negligence against the defendant, unless the doctrine of *res ipsa loquitur* be applied, and this under the peculiar facts of this case was precluded by a previous instruction "that the accident occurred will not of itself show negligence on the part of defendant, but you should determine the question (defendant's negligence) from all the facts and circumstances before you." Nor does the instruction first quoted proceed on the theory that such doctrine is applicable, but exacts specific findings from the evidence constituting the elements of negligence alleged. As to whether it should be applied in a case like this, there is some difference of opinion among the members of the court, and, as the cause was not tried on that theory, we



shall make no pronouncement on the subject at this time. But see valuable notes to *Fitzgerald v. Railway* (Minn.), 6 L. R. A. (N. S.) 337, and *Byers v. Carnegie Steel Co.* (Wash.), 16 L. R. A. (N. S.) 214.

II. But there was sufficient evidence to carry the case to the jury. True, the hostler in charge of the engine testified that he neither did nor omitted anything which might have caused the engine to move; but the engine was under his immediate control, and the movement of an instrumentality of such construction and great weight without the application of force is so extremely unlikely that the fact that it did move furnishes some evidence that the person in charge and whose duty it was to manage it was responsible for such movement. To this circumstance should be added the testimony of the plaintiff that immediately after getting from the engine, and while lying on the ground near by, he said to the hostler: "Harry, what in the hell have you been doing? You know I notified you." To this the hostler replied: "I didn't throw the lever in the center. I thought I had the steam shut off, but I didn't." This was admissible as a part of the *res gestae*. *Alsever v. Railway*, 115 Iowa, 338. Even though the hostler declared that plaintiff misunderstood him, and that he said instead that he had "put it [lever] in the center notch," and did not see what caused it to move, the question of veracity was for the jury, and from all the evidence they might have found that the movement of the engine was due to negligence of defendant's employee in charge.

III. The court instructed the jury, in substance, that, even though plaintiff was negligent in attempting to go under the engine or in getting under it, yet, if defendant's employee in charge of the engine with knowledge of his peril could by the exercise of ordinary care have avoided the injury,

2. SAME: negligence: evidence.

3. SAME: last fair chance.

the defendant was liable. The evidence was not such as to warrant the jury in finding that the defendant was guilty of any negligence subsequent to conduct of plaintiff claimed to have constituted contributory negligence, and for this reason the issue involving the doctrine of last fair chance ought not to have been submitted to the jury.

IV. Much is said in argument of evidence and the instructions to the jury on the question whether a settlement evidenced by a written instrument pleaded and introduced for the defendant was procured by

4. SAME:  
settlement:  
fraud:  
evidence.

fraud. Evidence that plaintiff and the members of his family present at the time when the agent for the defendant secured his signature to this instrument of release were unable to read the English language was admissible under the issues; for, fraudulent representations on the part of the agent being pleaded as made for the purpose of securing such release, it was competent to show that plaintiff did not, in fact, know the contents of the instrument which he signed, and that such contents were misrepresented to him by defendant's agent. The court erred, however, in leaving it to the jury to say whether defendant's agent promised plaintiff a job in connection with the securing of the instrument of release; there being no evidence that any such promise was made.

It was also error in connection with the allegations of fraud to submit the question whether defendant's agent, as an inducement to the settlement, represented that plaintiff's injuries were slight, and that he would

5. SAME.

soon recover therefrom. The only evidence as to such representations was that defendant's claim agent at the time of procuring a settlement represented that he understood from defendant's physician that plaintiff would be well in three weeks, and, further, that the claim agent stated affirmatively that defendant would be

well in three weeks. It was not shown that the statement as to what the physician said was false, and the direct representation that plaintiff would recover in three weeks was evidently merely an expression of opinion not shown to have been fraudulently made. *Nason v. Railway*, 140 Iowa, 533; *Kilmartin v. Chicago, B. & Q. R. Co.*, 137 Iowa, 64. Furthermore, it does not appear that plaintiff relied on the claim agent's statements, for he insisted upon pay for four months' time which he would lose by reason of the injury. Plaintiff had had the advice of his own physician, and was in as good a situation as defendant's agent to know how soon he was likely to recover. A motion by appellee to strike appellant's reply is overruled.

For the reasons pointed out, the judgment of the trial court is *reversed*.

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E. HEISE V. THE CHICAGO GREAT WESTERN RAILWAY COMPANY, Appellant.

**Railroads: CROSSING ACCIDENT: FAILURE TO GIVE SIGNALS: INSTRUCTION.**

- 1 Where the plaintiffs claim of negligence, in an action for the value of cattle killed at a railway crossing, was that defendant operated its train over a particular highway at an unlawful speed and without giving the statutory signals, an instruction allowing recovery for failure to give the statutory signals at other crossings was erroneous, because the only claim of negligence in that regard has reference to the crossing where the accident occurred; and for the further reason that by the language of the statute the inquiry is limited to a failure to give the signals for the particular crossing as to which complaint is made.

**Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** It is competent to show

- 2 whether signals were given at preceding crossings, which were or might have been heard by the person in charge of cattle killed at a particular crossing in time to have avoided the accident, as bearing on the care of the person in charge of the cattle killed by reason of the alleged failure to give the signals; but when received for that purpose it will not be presumed on appeal that the

other party consented to its consideration on an issue not presented by the pleadings.—Ladd J., dissenting.

TUESDAY, JANUARY 26, 1909.

*Appeal from Fayette District Court.*—HON. A. N. HOBSON, Judge.

ACTION to recover the value of cattle killed by defendant's train at a highway crossing. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

G. H. Phillips, W. J. Ainsworth and Carr & Carr,  
for appellant.

G. H. Rohrig and D. W. Clements, for appellee.

MCCLAINE, J.—Certain cattle belonging to plaintiff and another (plaintiff being the assignee of the cause of action of his co-owner) were being driven along a highway, crossing defendant's railway a short distance northwest of a signal station on defendant's road, when they were run into by a passenger train of defendant's coming from the northwest and several of the animals were killed. Plaintiff bases his right to recover for the killing of these animals upon allegations that the defendant was "owning and operating a line of railroad through Fayette County, Iowa, and maintaining its yards, tracks, and terminals on, over and across a certain public highway," further described, and that on the date of the accident "the defendant, by its agents and servants, while so operating one of its engines and cars on its said railroad on, over and across the above-described highway, and on, over, and across its yards and terminals, did negligently, wrongfully, wilfully, wantonly, maliciously, carelessly, without giving any warning or statutory signals, and at an unlawful and

prohibited rate of speed run its engine and cars onto and upon thirteen head of cattle," etc. The only question submitted to the jury as to the negligence or wrong of defendant was as to failure to give the statutory signals required by Code, section 2072, providing that "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached; and, after the sounding of the whistle, the bell shall be rung continuously until the crossing is passed," and declaring that the company shall be liable for all damages sustained by reason of the neglect of any railway company to comply with the provisions of the statute. A penalty for such neglect is also imposed on any officer or employee of the company violating any of the provisions of the section. It appears from the evidence that there was another highway crossing over the railway track one thousand one hundred and twenty-one feet further northwest, and still another about a mile northwest of the crossing where the cattle were killed, and that between the two last-mentioned crossings there was a station whistling post. There was conflicting evidence as to whether statutory signals were given at each of these three highway crossings, and the court instructed the jury that the particular acts of negligence complained of consisted in "the failure of the defendant's servants and agents operating the train to sound the whistle and ring the bell at the crossings in question," and that the jury should carefully examine the testimony and determine "whether the whistle was twice sharply sounded at least sixty rods before the road crossings in question were reached, and whether, after the sounding of the whistle, the bell was or was not continuously rung until the crossing was passed." Under the evidence and these instructions the jury might have found a breach of duty on the part of defendant rendering it liable for the killing of the animals in question in failing

to give the statutory signals at either the first or second of the crossings northwest of the crossing at which the animals were killed, although proper statutory signals were given at the crossing where the accident occurred.

We think the instructions of the court allowing a recovery for failure of the defendant to give statutory signals at other crossings than the crossing at which the accident occurred were erroneous for two reasons: First, because no issue was presented in the pleadings as to any fault of the defendant in failing to give signals at other crossings than the one where the accident occurred; and, second, because failure to give signals at other crossings can not be considered in determining the liability of the defendant for failure to give signals at the crossing where the accident occurs.

1. RAILROADS:  
crossing  
accident:  
failure to  
give signals:  
instructions.

The first of these propositions depends on a construction of the plaintiff's petition, which we have set out with sufficient fullness to show that the only claim with reference to failure to give statutory signals was with reference to the crossing where the animals were injured. There was nothing in the pleadings to advise defendant that it should be prepared to show that it had given statutory signals at other crossings.

As to the second ground of error above suggested it is sufficient to say that it is negligence to fail to give the statutory signals "before a road crossing is reached" for which the railway company is made liable for damages sustained by any person by reason of such neglect. In other words, by the specific language of the statute the inquiry with reference to damages resulting from the failure to give statutory signals at a crossing is limited to the failure to give the signals required for the particular crossing as to which there is such complaint. It is true that we have held, in *Lonergan v. Illinois Cent. R. Co.*, 87 Iowa, 755, and *Ward v. Chicago, B. & Q. R. Co.*, 97 Iowa,

50, that these signals are not only for the benefit of persons who are on or about to cross the track, but also for the benefit of those who are near the crossing with teams, or otherwise, so that the signals, if given, would have assisted them in avoiding injury resulting from the operation of the train. In the latter of these cases it was said that it was a question for the jury to determine whether the engineer should have apprehended that the speed of the train and the failure to give the statutory signals would likely imperil those in close proximity to the track or about to cross it. But there is no indication in either of the cases that the inquiry as to failure to give statutory signals at other crossings can be imputed to a railway company as a wrongful act proximately connected with an injury at or near a crossing at which statutory signals are in fact given. There must be some proximate connection between the wrong complained of and the injury suffered, and no matter what may be the wrong of the defendant, it is responsible only for injury to one to whom a duty is owed involving the wrongful act or neglect of which complaint is made. It will not do to leave it open to speculation whether, if signals had been given at a crossing a mile away, the injury at or near the crossing with reference to which the statutory duty to give signals is involved would have happened; nor will it do to say that persons as to whom the defendant owes no duty whatever can recover for injuries which such persons might have avoided had the signals been given. Those who are at or near a crossing and in such situation with reference to the railroad track that the company owes them some duty of warning may complain of the breach of the statutory duty as to signals at such crossing, but as to all other persons the failure to give the statutory signals is too remote a cause on which to base a recovery.

It is insisted for appellee that the case was tried, without objection, on the theory that failure to give statutory

signals at either of the other crossings, if established, would constitute negligence or breach of duty toward the plaintiff on the part of the defendant, and that therefore the court properly instructed on that theory, but this claim is not supported by the record. The evidence as to signals bore on the issue whether the man in charge of the cattle exercised reasonable care in attempting to prevent them from being run into by the train, and for that purpose it was competent to show whether or not signals were given which he did hear, or might reasonably have heard, in time to have kept the cattle out of danger from the approaching train. Evidence on the part of the defendant that signals were given at the crossing next preceding that at which the cattle were injured was also properly introduced to show that the person in charge of the cattle was thus warned of the approach of the train, and a failure to give signals at the crossing where the accident occurred would have been of no further advantage to him in preventing the accident. As the evidence at the other crossing was therefore competent for another purpose, it is not to be assumed that defendant consented to its consideration by the jury on an issue not presented by the pleadings; that is, the issue of negligence or wrong of the company in failing to give statutory signals at the other crossings.

It is further contended for appellant that a verdict should have been directed for defendant on account of insufficiency of the evidence to show negligence or breach of duty on defendant's part, or freedom from contributory negligence on the part of the person in charge of the cattle, but we are satisfied that in the record there is sufficient evidence to justify the court in submitting the case to the jury. Other errors assigned with reference to the giving and refusal of instructions are not in our judgment of sufficient importance to justify their discussion.

For the errors pointed out, the judgment is *reversed*.



LADD, J., dissenting.—The highway crossing to the northwest was but one thousand one hundred and twenty-one feet from that where the cattle were injured by the train. It was moving at a speed of about forty-five miles an hour, and manifestly one might not rely on the signals sixty rods distant in driving a slowly moving herd of cattle on the crossing. Would he have the right to rely on signals being sounded for the crossing one thousand one hundred and twenty-one feet farther away? This issue is clearly raised in the pleadings and to this inquiry the majority say no. But for previous decisions of this court there might be ground for this conclusion, on the theory that the duty imposed by statute is due only to persons or animals using or about to make use of the particular crossing. See *Reynolds v. Ry.*, 69 Fed. 808 (16 C. C. A. 435, 29 L. R. A. 695); *Railway v. Depew*, 40 Ohio St. 121; *Pike v. Ry.* (C. C.) 39 Fed. 754; *Bell v. Ry.*, 72 Mo. 50; *Harty v. Ry.*, 42 N. Y. 468; *O'Donnell v. Ry.*, 6 R. I. 211; *East Tenn., Va. & Ga. Ry. Co. v. Feathers*, 10 Lea (Tenn.) 113; *Ranson v. Ry.*, 62 Wis. 178 (22 N. W. 147, 51 Am. Rep. 718). But this court has elected to give a broader construction of the statute, and apparently held that, as a penalty is attached to its violation, any proximate injury flowing therefrom is the subject of redress. See *Loneragan v. Ry.*, 87 Iowa, 755, where the owner of a team, who was engaged in unloading a wagon into a corn crib on the depot grounds, might recover damages resulting from the frightening of said team by a passing engine; it being shown that the crib was near a highway and the engine's bell not rung. In *Ward v. Railway*, 97 Iowa, 50, the blowing of the whistle while the wagon was still on the right of way frightened the team, and the issue whether, had the bell been rung for sixty rods before reaching the crossing, the team would have been out of harm's way was held for the jury. Why not follow these decisions to their logical conclusions or else overrule them? The ma-

jority lay down the rule that those "at or near a crossing, and in such situation with reference to the railroad track that the company owes them some duty of warning, may complain of the breach of the statutory duty as to signals at such crossing." How near must the person entitled to the protection of the statute be, and in what situation? It seems to me a better construction to say that the statute has for its object the protection of all coming in vicinity of the railroad, and any one lawfully in a situation where the negligent omission to sound the whistle or ring the bell, as exacted by law, may constitute the direct and proximate cause of the injury to him is entitled to aver such negligent act as a basis of an action. In *Ranson v. Railway*, 62 Wis. 178 (22 N. W. 147, 51 Am. Rep. 718), the court decided that such signals were for the protection of those driving along a highway parallel with the track. In Kentucky the doctrine prevails that persons in the adjacent streets may rely on the highway signals, *Louisville, etc., Ry. Co. v. Penrod*, 108 Ky. 172 (56 S. W. 1), and, though no signals need be given at private crossings, persons approaching or crossing these, are held by several courts to be within the protection of the law requiring signals at public crossings. *Cahill v. Railway*, 92 Ky. 345 (18 S. W. 2); *Sanborn v. Railway*, 91 Mich. 538 (52 N. W. 162, 16 L. R. A. 1198). See also, *Norton v. Railway*, 113 Mass. 366; *Wakefield v. Railway*, 37 Vt. 330 (86 Am. Dec. 711).

The test, as it seems to me, is whether one is lawfully in a position in which the failure to observe the statutory duty might work an injury. If so, the right to complain exists. In my opinion, the issues as to whether there was a failure to give the statutory signals for the crossing first above at least, and whether such failure was the proximate cause of the collision, were rightly submitted to the jury.

FRANCES ELIZABETH PAXTON v. A. C. PAXTON ET AL.,  
Appellants.

**Wills: CONSTRUCTION: ESTATE DEVISED: POWER OF SALE.** A will devising to the wife of testator all his property "to be used by her and enjoyed as she may choose during her natural life, and at her death if any property is remaining to be divided equally among my children," does not pass to the widow a fee simple title to the real property; although her power of sale is such as to cut off the interest of the children therein.

*Appeal from Tama District Court.*—HON. C. B. BRADSHAW, Judge.

TUESDAY, JANUARY 26, 1909.

ACTION in equity to secure the construction of the provisions of a will. There was a decree in favor of plaintiff, and defendants appeal.—*Reversed.*

*Willett & Willett*, for appellants.

*J. R. Caldwell* and *D. G. Baker*, for appellee.

MCCLAINE, J.—Plaintiff is the widow of Thomas Paxton, who in March, 1899, died testate, seised in fee simple of certain real estate, and the defendants are testator's children. Plaintiff alleges that, under the provisions of testator's will, which has been duly probated, she is either the absolute and unconditional owner in fee simple of the real estate of which testator died seised, or is entitled to a life estate therein, with the right of unlimited power of disposition and alienation in addition thereto, and that it is desirable to have an interpretation placed upon the

will defining the rights and interests of plaintiff in said real estate, in order that the same may be advantageously sold by plaintiff for its actual cash market value, and further that it is necessary to sell said real estate in order that the desire and intention of the testator may be fully carried out, and that said estate may be used and enjoyed as plaintiff may choose in accordance with the provisions of said will. The defendants allege, in substance, that plaintiff's interest in the real property of testator under his will is a life estate only, the remainder being devised under the provisions of said will to the defendants as children of testator. The trial court held that the devise of the real estate to the plaintiff should be construed as in fee simple; no interest whatever vesting in the defendants or remaining undisposed of under said will.

The language of the will, so far as it is involved in this controversy, is as follows: "First I give, devise and bequeath unto my beloved wife, Frances Elizabeth Paxton, all my property real and personal of any name or nature to be by her used and enjoyed, as she may choose during her natural life and at her death if any property is remaining to be divided equally among my children, and I hereby appoint the said Frances Elizabeth Paxton the sole executrix of this my last will and testament to act as such executrix without bonds." The devise to plaintiff with the right to use and enjoy, so far as it is to be applied to real property, does not necessarily vest in her a fee-simple estate. Such language is as consistent with an estate for life as it is with an estate in fee-simple. *Haviland v. Haviland*, 130 Iowa, 611. If the words "during her natural life" had immediately followed the words "to be by her used and enjoyed," there would be no doubt as to the intention of the testator to vest only a life estate in the widow. We do not think that the interposition of the words "as she may choose" affects this natural construction of the language used. If the words "during her natural

life" are to be construed as descriptive of the choice which she may exercise, and not of the estate with which she is vested, they are deprived of any meaning whatever in reaching testator's intention; and it is fundamental that, if practicable, all the language used shall be so construed as that each portion shall have some force and meaning. This is not a case in which, following an absolute devise, there are other clauses of the will contemplating a subsequent distribution of the same property to other devisees. The limitation is in the very clause describing the nature and extent of the interest devised; and, as thus read, there is no expression of any intention to vest a fee-simple estate in the wife. *In re Proctor's Estate*, 95 Iowa, 172. It is to be noticed, also, that the language does not expressly include, as descriptive of the nature of the widow's right, a power to dispose of the property as her own, or for her own use and benefit. The case is thus distinguished from the cases of *Simpkins v. Bales*, 123 Iowa, 62, and *In re Burbank's Will*, 69 Iowa, 378. Therefore we think that the trial court erred in construing the will as vesting a fee-simple estate in the plaintiff. But as plaintiff asked that the will be construed either as vesting in her a fee-simple estate, or an estate for life, with unlimited power of disposal, and the defendants insisted that plaintiff's interest was a life estate only, we must further determine whether plaintiff has a right to sell and convey a good title in fee simple.

A devise which passes only a life estate may nevertheless be coupled with a provision giving the devisee unlimited power of disposal. The devise in remainder vests at once in the devisees thereof a fee-simple title to whatever may remain undisposed of under this power, subject only to the life estate of the first devisee. *Steiff v. Seibert*, 128 Iowa, 746; *Podaril v. Clark*, 118 Iowa, 264; *Spaan v. Anderson*, 115 Iowa, 121; *In re Stumpenhousen's Estate*, 108 Iowa, 555; *Haviland v. Haviland*, 130 Iowa,

611; *In re Proctor's Estate*, 95 Iowa, 172. The language of this will does not expressly confer upon plaintiff the power to dispose of the real estate, but it does indicate that such real estate may be disposed of during her lifetime, and that only such portion as shall remain undisposed of at her death is to pass to the defendants. The necessary implication from the language used is that the real estate, or any portion thereof, may be sold, and the title thereto conveyed in such way as to cut off any interest of the defendants in the property. This has been expressly held in the case of *Webb v. Webb*, 130 Iowa, 457, where the language of the will authorized the widow, as devisee, "to have and to hold" the property described "during her life, and at her death, whatever remains to be divided equally between" testator's children; and the court said: "This, of course, gave the widow implied power of disposition during her life, but it also limited her estate (in the property) to one for life." While we arrive at a construction of the language of the will different from that announced by the trial court, the result is nevertheless that plaintiff's right to sell, which she asked to have determined, is sustained, and the decree, so far as it establishes such right, is affirmed; but so far as the decree vests absolute fee-simple title in plaintiff, it is reversed, and the case is remanded for a decree in harmony with this opinion.—*Reversed*.

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ALICE C. SEBERG, Appellant, v. IOWA TRUST AND  
SAVINGS BANK and FRANK W. VORSE.

**Boundaries:** ESTABLISHMENT BY AGREEMENT: ESTOPPEL: NOTICE TO THIRD  
I PARTIES. Where a conveyance of part of grantor's realty by metes and bounds refers to no natural or artificial objects by which the description may be applied, it is competent for the parties to agree upon a division line, and when such agreement has been executed,

followed by possession and improvements by the grantee in reliance thereon, it becomes conclusive on the parties; and where such line is marked by plain artificial monuments, up to which the vendee is in possession, the grantees of the adjoining land are bound to take notice of his rights.

**Same: LOCATION OF STREET LINE.** Where a lot owner erected a building on the street line where it has stood for a long series of years, and during all of the time the street had been used and improved with respect to it, a location of the line was thus effected with such definiteness that it will prevail against a survey made by one who could not determine with accuracy the original lot lines.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

TUESDAY, JANUARY 26, 1909.

**ACTION** to enjoin defendants from constructing certain improvements and to quiet plaintiff's title. Defendants answered, and in a cross-petition prayed that the division line between the premises of plaintiff and defendants be established. On hearing the division line was decreed as prayed by defendants, but plaintiff was held entitled to an irrevocable license to occupy part of defendants' premises, with an existing stairway during the life of the building. Both parties appeal, that of plaintiff being first perfected.—*Reversed.*

*C. J. Eller and Read & Read*, for appellant.

*Baily & Stipp and Stewart & Anderson*, for appellees.

**LADD, J.**—For more than thirty years prior to August 8, 1902, C. J. Coddington was owner of the west forty feet of the south ninety feet of lot 6 in block 17 of East Ft. Des Moines. About that long ago he erected a two-story brick building on the west twenty feet, as he supposed, extending back sixty-three feet with but a brick

veneer on the east wall. Shortly afterwards he extended the building twenty feet to the east, but removed the veneer, and sealed the 2x4 studding as a partition on the west side, and lathed and plastered it on the east side. A basement was constructed at the same time, and a brick pier, seventeen inches wide in the center of the front, to support the timbers for both parts of the entire building. The partition in the basement consisted of posts, on which boards were nailed, supporting a sill under the joist, and through the partition in the upper story were a couple of doorways. The east portion of the first floor had been occupied more than twenty years as a millinery store, while that to the west also appears to have been made use of for business purposes. On the day mentioned the owner contracted to sell to plaintiff "the store building and lot twenty by ninety feet, and known as 502 East Grand Avenue being a part of lot six, block seventeen East Fort Des Moines," for a consideration named. She took possession immediately under the contract, and some time later closed the doorways in the upper partition, and constructed a stairway from the front to the second story next to the partition on the first floor. On September 3, 1903, she received from Coddington a warranty deed purporting to convey to her property in Polk County, described as follows: "Lot known as number 502 East Grand Avenue, and described as follows: Beginning twenty (20) feet east of the southwest corner of lot six (6), block seventeen (17) East Fort Des Moines, and running thence east twenty (20) feet, thence north ninety (90) feet, thence west twenty (20), hence south ninety (90) feet to the place of beginning." In selling the property to plaintiff Coddington, as the evidence tended to show, pointed out the partition mentioned as the west boundary, and represented and intended to convey to her, as she supposed she was purchasing the east half of the building, and the land on which it stood, with that extending back. Some time in



1905 the owner also conveyed to the Iowa Trust & Savings Bank the west half of said forty feet, with other property, particularly describing it, to satisfy the existing indebtedness of the grantor, he intending thereby to dispose of that portion of the forty feet not conveyed to the plaintiff. In July, 1907, the bank contracted to sell the premises to Vorse, who proposed to improve them by inserting a new front, in which enterprise plaintiff contemplated joining, until a dispute arose concerning the boundary line between their respective tracts. A civil engineer discovered that the center of the partition was seventeen and one-half inches at the north end of the building and fourteen and one-half inches at the south end, west of the middle of the west forty feet of the south ninety feet of the lot; and, when defendant Vorse undertook to erect a pier eighteen inches wide with the center at the division line as ascertained by the survey, this action was begun to enjoin him therefrom. Considerable evidence of conversations with plaintiff was introduced; but, as nothing appears to have been said impairing her rights under the facts as recited, no attention need be given thereto.

From this statement it is manifest that the common grantor had regarded the brick pier in front, and the partition, as marking the center of the tract of ground, and the brick veneer walls the outsides, for about thirty years. He pointed out to plaintiff the partition as being on the line, and, while himself retaining the west twenty feet, put her in possession of all east of these monuments as having been purchased through the contract and deed. As argued, the deed was neither ambiguous nor defective, but it referred to neither natural nor artificial monuments by means of which the description therein might be applied to the premises, and in these circumstances it was competent for plaintiff, as purchaser of the east half of the premises, and Coddington, who retained the west half,

1. BOUNDARIES:  
establishment  
by agreement:  
estoppel:  
notice to  
third parties.

to agree upon these monuments as marking the division line between their respective tracts of land. This was followed by occupancy in accordance therewith, and the erection of a stairway and vestibule by plaintiff next to the partition, in reliance on this forming the boundary. Having themselves agreed upon the line on the ground between their respective tracts, and having executed the agreement by completing the sale, taking possession, and making improvements in reliance thereon, there was no occasion for a survey to ascertain the middle of the forty-foot strip, for each was concluded by their agreement. *Rowell v. Weinemann*, 119 Iowa, 256; *Spiller v. Scribner*, 36 Vt. 245; *Sawyer v. Fellows*, 6 N. H. 107 (25 Am. Dec. 452); *Lindsay v. Spunger*, 4 Har. (Del.) 547; *Smith v. Dudley*, 1 Litt. (Ky.) 66 (13 Am. Dec. 222); *Houston v. Sneed*, 15 Tex. 307; *Grim v. Murphy*, 110 Ill. 271. This is on the principle, not that title passes by parol contract, but that the extent of the ownership of the land of each has been agreed upon, settled and determined, and that, when acted upon, the parties are estopped from questioning the executed agreement. As the line so fixed upon was marked by plain artificial monuments, up to which plaintiff was in possession, those claiming under Coddington took with notice. *Roos v. Connell*, 7 Kulp (Pa.) 113; *Kerr v. Wright*, 37 Pa. 196; *Houston v. Sneed*, 15 Tex. 807.

The principle is of universal approval that where the vendor points out the boundary of a parcel of land to the vendee, and the latter purchases and erects valuable improvements in accordance with such boundary and in reliance thereon, in a manner such that a change of boundary would result in great injury to the vendee, the vendor and those claiming under him are estopped from insisting that the division line is elsewhere. *Ross v. Ferree*, 95 Iowa, 604; *Dolde v. Vodicka*, 49 Mo. 98; *Ross v. Connell*, 7 Kulp (Pa.) 113; *Titus v. Morse*, 40 Me. 348 (63

Am. Dec. 665); *Willis v. Schwartz*, 28 Pa. 413; *Guest v. Guest*, 74 Tex. 664 (12 S. W. 831); *Bolton v. Eggleston*, 61 Iowa, 163. Whether the case falls within the rule need not be decided. It was pointed out in the last decision cited that there is no occasion in such a case to ask for the reformation of the deed, as that is a matter between grantor and grantee, and of no concern to one not a party to the contract.

Regardless of whether the partition and brick pier were designated in making the sale as marking the boundary, however, the evidence was sufficient to show that these did in fact indicate the line separating the two twenty-foot strips. If the brick veneer wall forming the west side of the building extends to, but does not encroach upon, Fifth street, running north and south, defendants took under the deed from Coddington, and obtained possession of precisely what it purported to convey, namely, a strip twenty feet wide up to the partition. The builder intended to erect the wall on the line. It had stood unchanged where he placed it for more than thirty years, and the street had been used and improved with reference to its outer edge as constituting a street line. In these circumstances it may well be said that this constituted a practical location of the west line of the lot with such definiteness that it should prevail, at least until assailed by better evidence of its location than was adduced on the hearing. See *Klinkner v. Smidt*, 114 Iowa, 695. That before us is not of this convincing character. According to the testimony of the civil engineer on which appellees rely, the following data were relied upon from which to make the survey: "The cross on the northeast corner of the curb at Locust and Fifth streets (a block south), the bank building at the northeast corner of Grand Avenue and Fifth Street and then we agree that the curb at Des Moines Street and Fifth Street and also an old lot stake." He had nothing to do with the location of the cross, and no proof con-

a. SAME:  
location of  
street line.

cerning it was adduced. He had located the corner of the bank building years ago, "from center stakes as they stood in the street at that time," as he learned from the record, but there was no evidence as to what these stakes were, or the reference made to them in the record. He knew nothing of the curb on Des Moines Street, and said the curbs had become unreliable as indicating localities, and knew nothing of the Sixteenth Street line. Indeed the witness admitted that it was impossible to determine whether the lines as established by him run with the lines of the original plat. But this was the very object of the survey, and to render it of any evidentiary value as pointing out the original lines, it must have been based on reliable data. *Bevering v. Smith*, 121 Iowa, 607. Such a survey is of little value in ascertaining the true location of lines as established by the filing of a plat, and should have been held insufficient to show the west line of the lot elsewhere than as indicated by the building.

The conclusion reached renders the discussion of other questions argued unnecessary.—*Reversed*.

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LAURA B. SMITH and SIDNEY SMITH v. GEORGE REDMOND,  
Appellant.

**Trial:** ASSIGNMENT OF CAUSES FOR SUCCEEDING TERM. Conceding the  
1 courts inherent power to assign a cause for trial on a particular day of a future term, it cannot do so where the issues have not been made up and it does not appear that there will be anything to try at the time set.

**Same:** RIGHT TO JURY TRIAL: DEMAND: WAIVER: CONTINUANCE. A de-  
2 fendant has a right to a jury trial in a superior court if demanded when the cause is assigned for trial, otherwise the right is waived, but to constitute a waiver the assignment must be for the present term, in conformity with the statute; so that when a cause not at issue was assigned for a future term failure to demand a jury at the time of the assignment was not a waiver of the right, but

a demand at the time set for trial was timely; and if a jury was not summoned for that day a continuance should have been granted until it was in attendance.

**Pleading:** TIME FOR FILING. A counterclaim filed with an answer, if  
3 the answer is accepted as filed in time, should not be stricken as not timely.

*Appeal from Cedar Rapids Superior Court.*—HON. JAMES  
H. ROTHROCK, Judge.

TUESDAY, JANUARY 26, 1909.

ACTION to recover damages for detention of real property. On trial without a jury there was judgment for plaintiffs, and defendant appeals.—*Reversed.*

*Jamison & Smyth*, for appellant.

*Main & Griffiths*, for appellees.

MCCLAIN, J.—Plaintiffs' petition was filed in the superior court of Cedar Rapids on March 16, 1907. In June following, a demurrer was filed to such petition, which on the 17th day of July next thereafter was overruled. The date of the overruling of the demurrer was within the July term of said court, which term extended beyond the 29th day of August, the next term commencing on September 2d. No answer was filed until September 4th, when the defendant filed an answer and a counterclaim. On motion of plaintiffs the counterclaim was stricken from the files, on the ground that it was filed on the day before the cause was set for trial, and tendered issues which plaintiffs were unable to meet at that time, and was filed without leave of court. On the next day the defendant filed a motion for continuance, on the ground that the cause was not properly set for trial on that day,

that no jury was available for the trial of the cause, and that the counterclaim had been stricken from the files. In this motion it was offered on behalf of defendant that the cause might be tried at a later day of the term after there should be a jury. This motion for continuance being overruled, and the cause being called for trial, the defendant demanded a trial by jury which was denied, and thereupon a trial was had to the court, resulting in the judgment for plaintiffs.

The correctness of the court's action in striking out the counterclaim, refusing a continuance and denying trial by jury, depends upon the effect of an assignment of the cause for trial September 5th, which assignment was made on August 29th, during the July term. There is no statutory provision specifically referring to assignment of causes in the superior court, but by Code, section 263, it is provided that statutes governing the district court as to matters of practice shall apply to and govern the superior courts, except when inconsistent with specific provisions relating to the latter courts, and by Code, section 3659, it is provided that in district courts on the first day of the term, or as soon thereafter as practicable, an assignment of trial causes may be made which shall fix the day of the term on which each cause will be tried, and that further assignments may be made by the court as often as necessary. It may be, as contended by counsel for appellee, that a court in which a cause is pending has the inherent power to assign it for trial on a particular day of a future term, but it can hardly be claimed that such an assignment can be made of a cause not yet ready for trial, and in which the issues have not been joined. At the time of the assignment of this cause for trial, there was no answer on file, nor was there any order of court requiring an answer to be filed by any particular time, and it did not therefore appear whether there would be any issue to be tried

1. TRIAL:  
assignment  
of causes  
for succeeding  
term.

at the date when the case was to be called under the assignment.

But the real difficulty is still deeper. Defendant had a right to a jury trial in the superior court, if demanded when the cause was assigned for trial; otherwise jury trial was waived. Code, section 268. Now what-  
2. SAME: right to jury trial; demand; waiver: continuance. ever the inherent power of the court may have been as to assigning the cause for trial at a following term, the assignment referred to in connection with demand for jury trial is necessarily such an assignment as the court was authorized to make under the provisions of the Code, and that assignment, as already indicated, could not be made save at the term during which the cause was to be tried. Therefore the failure of the defendant or his counsel to be present at the assignment of causes on August 29th and demand a jury trial did not under the statute constitute a waiver of such trial; and, when trial by jury was demanded on September 5th, the date for which the cause was assigned for trial, such demand was timely, and the court should have recognized it. On that date the cause could not be tried to a jury, for no jury had been summoned to appear at that term before September 9th. The court, therefore, should have also granted defendant's motion to have the cause continued until there should be a jury in attendance before which it might be tried, and should not have stricken out the counterclaim as not filed in time, for such counterclaim was filed with the answer, and, so far as we can understand from the record, was aptly filed. It is true that, with reference to the filing of the answer, it appears to have been in the hands of counsel for the plaintiffs in July, but we can not understand how this fact could have been of any significance.

3. PLEADING:  
time for filing.

The defendant had a right to file a counterclaim at the time he filed his answer, and as the court did not find him to be in default with

reference to an answer, his right to file a counterclaim in connection with such answer had not been forfeited.

The court erred in refusing a jury trial, and in refusing a continuance to enable the defendant to have the trial by jury to which he was entitled, and incidentally, as we think, the court erred also in striking out the counterclaim as not filed in due time.—*Reversed.*

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In the Matter of the Estate of ELIZA JANE JOHNSTON,  
Deceased.

**Wills:** CHARITABLE BEQUEST: UNCERTAINTY. A bequest for charitable purposes will be given effect if it can be done consistently with established rules. The will in question bequeathed a certain sum to a particular Presbyterian Church of which the testator was a member, and by a further provision gave to home and foreign missions a sum to be equally divided. The church was a part of the national organization, with a board of home missions and a board of foreign missions, to which the church contributed to assist them in carrying on their charitable enterprises. *Held*, that the testator intended the bequest for the boards of the home and foreign missions and was not void for uncertainty.—Ladd and McClain, JJ., dissenting.

*Appeal from Tama District Court.*—HON. C. B. BRADSHAW, Judge.

TUESDAY, JANUARY 26, 1909.

THE executor of the estate of Eliza Jane Johnston reported the net assets of such estate, after payment of the costs of administration, to be \$2,008.85. As this was less than the aggregate amount of the legacies, the executor prayed for a construction of the will as a basis of distribution. In the second item of the will \$300 was bequeathed to one daughter, \$800 to another, and \$900 to



a son. In the third item \$300 was given to the First Presbyterian Church of Toledo, Iowa, of which the testatrix was a member, on conditions which do not appear to have been complied with. Item 4: "I further give, devise and bequeath to home and foreign missions two hundred dollars in money to be divided equally share and share alike." The next item directs the erection of a monument, concerning which no showing was made, and that following disposes of the residue of the estate. The board of Foreign Missions of the Presbyterian Church of the United States, the Board of Home Missions of the same church, as well as the Presbytery of Waterloo, and the Presbyterian Church of Toledo, joined in asking a construction of the will, and alleged that the first two were incorporated bodies, maintained by the Presbyterian Church of the United States for the advancement of Christianity at home and abroad throughout the world; that the church at Toledo is incorporated as part of the Presbytery of Waterloo, and embraced in the Presbyterian Church of the United States; that the church at Toledo makes contributions to the boards mentioned at stated intervals, to enable them to carry on their charitable purposes. They pray the bequest in item 4 be sustained as valid. The executors admitted the facts alleged, but insisted that these were not sufficient to identify the beneficiaries under this item of the will. Item 4 of the will was adjudged invalid, and distribution directed accordingly. The two boards, Presbytery, and church appeal.—*Reversed.*

*J. R. Caldwell*, for appellant.

*C. E. Walters*, for appellee.

LADD, J.—The sole inquiry is whether the clause bequeathing "to home and foreign missions two hundred

dollars in money to be divided equally share and share alike" is sufficiently certain to enable the court to give it effect. In the clause immediately preceding testatrix gave conditionally to the Presbyterian Church of Toledo, of which she was a member, and it was admitted that that church is a part of the Presbytery of Waterloo, and embraced in the Presbyterian Church of the United States, which maintains a board of foreign missions and a board of home missions, both being incorporated, for the advancement of Christianity at home and abroad, and to which the church at Toledo made contributions at stated intervals to enable them to carry on their charitable enterprises. These extrinsic facts may be considered as tending to identify the objects of testatrix's bounty from the description contained in the will, and the only controversy is whether they are sufficient for that purpose. Charitable gifts are strongly favored. The courts will carry them into effect if this can be done consistently with established rules of law. Indeed it is said that courts never construe a charitable bequest void unless it is so absolutely dark that they can not find out the testator's meaning. The extrinsic facts are important as indicating the situation in which testatrix stood when she made the bequest. As a member of the Presbyterian Church, she was likely to have been interested in its religious and charitable enterprises, and may have aided in their support. In a previous clause she had remembered the local church, and in the opinion of the majority of the members of this court it is to be inferred therefrom, and the fact of her connection with that church, that she intended the bounty bestowed on home and foreign missions to go to the boards of home and foreign missions to whose maintenance the church contributed. This conclusion is said to have support in the authorities. In *Hinckley v. Thatcher*, 139 Mass. 477 (1 N. E. 840, 52 Am. Rep. 719), the deceased had willed the residue of his estate "equally to the authorized agents of

the Home and Foreign Missionary Societies to aid in propagating the holy religion of Jesus Christ," and the court held that, in view of his membership of a Congregational church, and his interest as manifested in the American Board of Commissioners for Foreign Missions and Massachusetts Home Missionary Society, these were intended by the testator. In *Brewster v. McCall's Devises*, 15 Conn. 274, the devise was to the "Missionary Society for Foreign Missions," and the extrinsic evidence was held sufficient to identify, from this description, the "American Board of Commissioners for Foreign Missions." See *Kinney v. Kinney*, 86 Ky. 610 (6 South. 593); *Board of Foreign Missions of Presbyterian Church v. Culp*, 151 Pa. 467 (25 Atl. 117). In *Gilmer v. Stone*, 120 U. S. 586 (7 Sup. Ct. 689, 30 L. Ed. 734) the gift was of the residue of the "estate to be equally divided between the board of foreign and the board of home missions," and the court held that evidence of testator's active membership of the Presbyterian Church; that collections were annually taken for the support of such boards of the Presbyterian Church, though without designating the church, and transmitted to such boards in connection with the preceding requests to the library of the local Presbyterian Church, for the erection of another church, and for the pastor's salary—sufficiently identified the beneficiaries as the boards of home and foreign missions of that denomination.

It is to be noted that in none of these decisions were the gifts directly to the missions, as in this case, but it may be assumed, as is thought by the majority, that testatrix intended her bounty to be bestowed through the ordinary and usual channels of the church provided for the distribution of such charity, and therefore the gift should be construed as intended for the boards of home and foreign missions of that denomination. See *Domestic and Foreign Missionary Society's Appeal*, 30 Pa. 425. The

writer with whom Mr. Justice McClain concurs is not able to go to the extent here required to sustain even a charitable gift, but is of the opinion that the will, when considered in connection with all the extrinsic facts, fails to identify the objects of testatrix's bounty. There is nothing in the record to indicate, save her membership of the local church, that she was interested in the missionary boards claiming the fund, or that she had ever participated actively in the charities of her church. In these respects the case is to be distinguished from those cited. Moreover, as she was not shown to be interested in missions generally, there seems to be no ground for thinking she intended her bounty for distribution among all the missions of the church rather than to some particular ones out of the innumerable enterprises of the kind in the different parts of the world. Nor do I think mere membership of a church enough without more to indicate that the design was to give to the missions of that denomination rather than to those of some other church or to the missions of all churches. In other words, it seems to me to be merely a matter of conjecture what she intended, and that the court, under the guise of a liberal construction, is not expounding and enforcing, but really making a new will. The precise question was before the Supreme Court of North Carolina in *Bridges v. Pleasants*, 39 N. C. 26 (44 Am. Dec. 94) where certain bequests were to be applied to foreign and home missions. In deciding the beneficiaries too uncertain the court said: "It is impossible from anything appearing in the will to conjecture how, by whom, or in whose favor these sums of money were to be administered; what kind of 'foreign missions,' whether diplomatic or religious, or if the latter, of what sect or what country no man can say. So likewise of 'home missions.' The distinction between a gift direct to charity not a trust, and one to a trustee to be by him applied to a charity, should not be lost sight of. In the

former the court turns over the fund to the charity as a ministerial act, and the objects of the bounty must be sufficiently certain to enable it to ascertain who are intended. In the latter the trustee is endowed with the power of selecting such objects, precisely as the testator might have done. In my opinion this was a direct gift, and the beneficiaries so uncertain as to render the bequest void. However, the majority think otherwise, and necessarily I yield, though not with reluctance, for, as once remarked by Chief Justice Wilmot in applying the doctrine of *cy pres*, 'one kind of charity will embalm testatrix's memory as well as another.' "

It follows that the clause of the will assailed is adjudged valid, and the judgment of the district court *reversed*.

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OLIVE M. JOHNSTON V. CEDAR RAPIDS & MARION CITY  
RAILWAY COMPANY, Appellant.

**Personal injury:** DECLARATIONS OF PRESENT PAIN: EVIDENCE. Declara-

1 tions of present pain by a plaintiff in a personal injury action are  
admissible as tending to prove the existence of such pain; and an  
objection that the same are incompetent, irrelevant and immaterial  
does not comprehend an objection that the same were made as  
self-serving declarations.

**Admission of evidence:** HARMLESS ERROR. Error in striking evidence  
2 which is afterwards received more in detail is harmless.

**Same:** OPINION EVIDENCE. Where a witness had already stated that he  
3 did not think plaintiff as badly injured as she testified, refusal  
to permit him to further explain how she might unconsciously  
have testified falsely as to the extent of pain suffered from an  
injury was not erroneous; especially as the witness had not shown  
any knowledge on the subject inquired about.

**Appeal:** QUESTIONS NOT RAISED BELOW: REVIEW. Where the trial  
4 court's attention was not called to the failure of plaintiff, in a

personal injury action to establish his freedom from contributory negligence, except by a general statement that the verdict was contrary to the evidence, the subject will not be reviewed on appeal.

**Negligence:** INSTRUCTIONS. Where the court specifically told the jury 5 what constituted negligence on the part of defendants, another general instruction to be read in connection therewith, that it was necessary for plaintiff to show that defendant was guilty of negligence causing the injury, did not authorize a finding of negligence regardless of the issues pleaded.

**Same.** Where the negligence charged was in failing to keep the steps 6 of a street car free from snow and ice, and the failure of the conductor to assist plaintiff in alighting, an instruction that evidence of the dangerous condition of the steps would show a duty on the part of the conductor to render such assistance was proper.

**Instruction:** LIMITATION OF JURY TO EVIDENCE AND INSTRUCTIONS. A 7 direction to the jury to arrive at its verdict solely from the evidence and instructions of the court is not objectionable as precluding consideration of the arguments of counsel.

**Carriers of passengers:** DEGREE OF CARE. A carrier of passengers is 8 bound to exercise the highest degree of care reasonably consistent with the practicable conduct of its business.

*Appeal from Cedar Rapids Superior Court.*—HON. JAMES H. ROTHROCK, Judge.

TUESDAY, JANUARY 26, 1909.

ACTION to recover damages for personal injuries alleged to have been received by plaintiff as a passenger while alighting from defendant's street car, due to the negligence of defendant's employees. There was a verdict for plaintiff in the sum of \$687.50, and from judgment thereon the defendant appeals.—*Affirmed.*

*William G. Clark and W. E. Steele, for appellant.*

*Bickel, Crocker & Tourtellot, for appellee.*

MCCLAINE, J.—The evidence tended to show that plaintiff, a passenger on a street car operated by defendant, while attempting to alight therefrom, slipped on the steps, by reason of snow and ice accumulated there, and fell to the pavement, sustaining a concussion of the spine for which damages were allowed by the jury.

I. Several witnesses called for plaintiff testified, over defendant's objection that the questions were incompetent and immaterial, that plaintiff complained at different times after her injury of pain in her back; and the refusal of the court to sustain the objections to the questions calling for this testimony is assigned as error.

1. PERSONAL INJURY: declarations of present pain: evidence. That statements of present pain may be shown as tending to prove the existence of such pain is too well settled in this State to be now subject to further argument. *Keyes v. Cedar Falls*, 107 Iowa, 509; *Rupp v. Howard*, 114 Iowa, 65; *Buce v. Eldon*, 122 Iowa, 92; *Patton v. Sanborn*, 133 Iowa, 650. Counsel for appellant insist that this general exception to the rule of evidence, which excludes proof of a party's declarations in his own favor, should be restricted to this extent at least, that such declarations made in contemplation of the institution of an action to recover damages, or after such action has been commenced, should not be admissible; but he raised no such question in the trial court. Some of the declarations to which witnesses testified were made soon after the injury, and before any suit was in contemplation, so far as appears from the record, and no distinction in defendant's objections was made between questions relating to these declarations and others calling for declarations and expressions of pain down to the time of trial. At no point in the record is it made to appear that counsel for defendant insisted upon the distinction which they now contend for. The trial judge was justified in assuming that counsel were insisting throughout on but one objection to this

testimony, that it was incompetent, irrelevant and immaterial, for the reason that pain and suffering of plaintiff could not thus be shown. We are not to be understood as conceding that the distinction, if made, would have been well taken. No such limitation as that now urged for appellant is suggested in any of our cases on the subject, and we do not feel called upon, under the record presented by the present case, to go into an elaborate discussion of possible limitations on the rule. Under the present liberal application of rules of evidence, which leaves considerations not necessarily resulting in the entire exclusion of any class of testimony to be applied in estimating its weight rather than its admissibility, the inclination seems to be not to exclude such declarations simply on the ground that they may have been made after the idea of instituting suit has occurred to the injured party. 3 Wigmore on Evidence, section 1721.

II. The answer of a witness for defendant that the tone of plaintiff's language immediately after the injury indicated to him that she was not hurt was stricken out, and this ruling is assigned as error; but the witness immediately afterwards was allowed to make a more definite answer to the question, and the ruling was without prejudice.

2. ADMISSION OF  
EVIDENCE:  
harmless error.

An answer, given by a witness for defendant with reference to an examination of plaintiff, tending to show that she was not suffering from concussion of the spine, was stricken out by the court, and this ruling is relied on as constituting error; but, after the answer was thus stricken, the court allowed the question to be repeated, and the answer thereto was allowed to stand. As the question was in fact answered, and, so far as the record shows, was answered as fully as the witness desired to answer it, and practically in conformity to the answer which was stricken, we find no prejudicial error in the ruling.

III. The same witness was asked the following ques-



tion: "State whether it is a recognized fact, a psychological and professional fact, that suggestions arising from a demand for damages, in connection with consultations of one's lawyers and the prosecution of the suit, may unconsciously affect a patient that is entirely well, so that she may believe herself to be subject to pain or ailments—what is your knowledge on that subject?" And counsel assign as error the ruling of the court in sustaining an objection to this question as calling for mere speculation on the part of the witness. As the witness had already testified to his belief that plaintiff was not as badly injured as she pretended to be, it was hardly necessary to have the witness explain how she might unconsciously have made false statements as to her pain. However, as the witness had not testified as to any knowledge with reference to the psychological fact of the tendency of a lawsuit upon the state of a claimant's mind with reference to her ability to tell the truth, and as counsel did not state what he proposed to show in this respect by the witness, we think there was no prejudicial error in refusing to allow the witness to answer. But the whole matter of inquiry related to the credibility and weight of the declarations as evidence, and was not to be determined by expert witnesses.

IV. While it is said in argument that plaintiff was guilty of such contributory negligence on her part, in attempting to leave the car by way of the platform and steps which were covered with snow and ice, there is no assignment of error relating to the question of contributory negligence.

The subject is not referred to in the motion for new trial, save in the general statement that the verdict is contrary to the evidence. As the court's attention was not therefore specifically called to any failure of plaintiff to establish her freedom from contributory negligence, it is not necessary that the assignment be further considered.

3. SAME: opinion evidence.

4. APPEAL: questions not raised below: review.

V. The allegations of negligence were that defendant negligently and carelessly permitted snow and ice to accumulate upon the steps of the car in which plaintiff was

5. **NEGLIGENCE:** transported as a passenger, and that the em-  
**instructions.** ployees of the defendant failed and neglected to assist plaintiff in alighting from the car. In stating the issues to the jury the court said that, to entitle her to recover, plaintiff must establish two ultimate facts: First, that the employees of the defendant, or some of them, were guilty of negligence which caused the accident; and, second, that plaintiff herself was not guilty of any negligence in any manner contributing to the accident. It is said by counsel that the jury was thus given a roving commission to find negligence on the part of the defendant, whether within the allegations of the petition or not. But the court did, in subsequent instructions, specifically state what omissions on the part of defendant's employees would constitute negligence entitling plaintiff to recover, and appellant has no ground of complaint in this respect. The instruction complained of was plainly a part of the statement of the general issue, and was to be read by the jury in connection with the other specific instructions in ascertaining what it was necessary for plaintiff to establish in order to entitle her to recover. There is not the slightest suggestion in the record anywhere that any other negligence than that specifically charged in the petition was even hinted at in the testimony, and the jury could not have been misled.

VI. An instruction in relation to the question whether it was the duty of defendant's conductor in charge of the car to assist plaintiff in alighting, in view of the dangerous condition of the steps, is com-  
6. **SAME.** plained of, but we are unable to see any ground of objection. It is plain that the same facts which tended to show negligence in not having the car steps in a safe condition for plaintiff to alight might also show a

duty on the part of the conductor aware of such dangerous condition to assist plaintiff in alighting; and, as we understand the instruction, this is what the court told the jury in apt terms. We can not see how there was any error in the instruction.

VII. The court instructed the jury to arrive at its verdict "solely upon the evidence that was introduced upon the trial, being governed by the instructions of the court,"

7. INSTRUCTION:  
limitation of  
jury to evi-  
dence and  
instructions.

and to permit nothing else to influence or prejudice its action. The complaint made of this instruction is that it precludes the jury from giving any attention to arguments of counsel. It is certainly not open to this objection. Arguments of counsel should not urge upon the attention of the jury any facts not appearing in evidence, nor any rules of law not applicable thereto, and we fail to see how the instruction precludes the jury from giving due consideration to such legitimate arguments as counsel may have made. We think the objection to be wholly without plausible weight.

VIII. Counsel for appellant submitted instructions in which the degree of care required to be exercised by defendant in keeping its car steps and platform in reasonably

8. CARRIERS OF  
PASSENGERS:  
degree of care.

safe condition for passengers to enter or leave the car was stated to be that of ordinary care, but these instructions were erroneous, and properly refused. The carrier of passengers is bound to exercise the highest degree of care, reasonably consistent with the practicable conduct of its business, to prevent injury to one who is being transported as a passenger, and this care extends to the facilities for alighting from a street car. *Root v. Des Moines City R. Co.*, 113 Iowa, 675; *Hutcheis v. Cedar Rapids & M. C. R. Co.*, 128 Iowa, 279, 283; *McGovern v. Interurban R. Co.*, 136 Iowa, 13. The case of *Hiatt v. Des Moines, N. & W. R. Co.*, 96 Iowa, 169, relied upon by appellant, is not in

point, for it has reference to the station platform, and not the platform of the car.

Finding no error in the record, the judgment is *affirmed*.

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WISECARVER & STONE, Appellee, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.

**Railroads: SHIPMENT OF LIVE STOCK: DELAY: DAMAGES: EVIDENCE: IN-**

1 **STRUCTIONS.** Instructions must be read with respect to the testimony and not with reference to an abstract proposition. In the instant case, involving a claim of damages for delay in the shipment of stock, the evidence showed that delivery to the connecting carrier could only be effected by presentation of the bill of lading, and that the same was presented to a transfer company recognized as the agent of the connecting line, which unloaded, watered and fed the stock, a customary duty of the initial company, causing delay in shipment. No negligence was charged against the connecting carrier but the case turned on the sufficiency of the evidence to show proper and timely delivery to the transfer company. *Held*, that instructions charging that to constitute delivery the stock must have passed to the control of the connecting line and that so long as any act remained to be performed by the initial carrier there was not a complete delivery, and that the court assumed that the initial company could not escape liability without showing timely delivery to the connecting line, and overlooked the fact that it was not responsible for the acts of the transfer company, were not prejudicial but fairly presented defendants case as disclosed by the evidence.

**Same: DUTY TO FEED AND WATER STOCK.** In the absence of a custom it  
2 is the duty of the carrier of live stock last receiving the same for through shipment during the twenty-eight hour period, to feed and water the same as required by statute; but where it has become the established custom for the initial carrier to perform this duty before delivering the stock to the connecting line, it is chargeable with any damages, the result of delay, by neglect or failure to do so.

**Same: CONTRACT LIMITATION OF CARRIERS LIABILITY.** A contract for  
3 the shipment of live stock which provides that the same is not to be transported or delivered at the destination within any specified time, nor in time for any market; that the shipper shall assume the risk of care and the expense of feeding and watering at all

times and places; and shall load and unload the same at his own expense is invalid, and will not relieve the carrier from damages for the negligent delay in shipment.

**Carriers of live stock: LIABILITY FOR INJURY.** A carrier of live stock  
4 whose negligent delay in transportation causes or contributes to injury of the stock, even though this does not develop until after it has delivered the same to a connecting carrier, is liable for the injury.

**Same: DAMAGES: INSTRUCTION.** A carrier of live stock is liable for all  
5 damages which naturally and proximately result from its failure to perform its duty, whether apprehended by it or not.

*Appeal from Jefferson District Court.*—HON. D. M.  
ANDERSON, Judge.

TUESDAY, FEBRUARY 9, 1909.

ACTION to recover damages for negligent delay in the transportation of a carload of horses, resulting in injury to the plaintiffs as owners by reason of the depreciation in value and loss of market. There was a verdict for the plaintiff, and from the judgment thereon defendant appeals.—*Affirmed.*

*Leggett & McKemey, Carroll Wright and J. L. Parrish*, for appellant.

*R. J. Wilson and E. R. Smith*, for appellee.

DEEMER, J.—The written contract between plaintiffs and the defendant for the transportation of a carload of horses belonging to plaintiffs from Winterset to Des Moines, destined for East St. Louis, provided that the liability of the defendant company should terminate upon delivery by it of said car to its connecting carrier. No connecting carrier was named in the contract, but the car was described as "consigned to John S. Bratton, care

of Wabash Railway, National Stockyards, East St. Louis, Illinois." Plaintiffs seem to have understood that the car would be forwarded from Des Moines to East St. Louis over the Wabash Railway. But as the defendant company and the Wabash Company had no connecting track in Des Moines, the car was delivered by the defendant upon the usual track of the Des Moines Union Railway Company, a common carrier of freight having connections both with the defendant company and the Wabash Company, thus forming a connecting link in the line of transportation from Winterset to St. Louis. If any negligent delay occurred in the transportation by the defendant company, it consisted in failure to put the car into the full control of the Des Moines Union Company with sufficient diligence; and with reference to such charge of negligent delay, the undisputed facts as disclosed by the record are that the car left Winterset about 2 o'clock p. m. of the day the horses were received, and the agent of the Rock Island Company said there was a Wabash train leaving Des Moines at about 9 or 9:30 o'clock the next morning. The usual time consumed in making a shipment from Winterset via Des Moines over the Rock Island and Wabash to East St. Louis was something over thirty hours. The car reached Des Moines about 7:30 p. m. November 27th, and as soon as it could be switched, was placed upon what was known as the Des Moines Union Transfer, a track belonging to, or at least used jointly by the Rock Island, the Des Moines Union, and Great Western Railway Companies. It is claimed that this was for the purpose of having the Des Moines Union take and switch it over to the Wabash tracks, that it might be received by the latter company. This switching to the transfer tracks was accomplished at about 8:50 or 9 o'clock in the evening, and when it had been accomplished, the Rock Island yard clerk called up the Des Moines Union office by telephone, and asked for the yardmaster. Being informed that he was

out, he asked the operator if he would tell the yardmaster that the car was on the transfer, which the operator promised to do. This yard clerk gave no other notice, gave no one the bill of lading that evening, but left it in the Rock Island freight office in Des Moines. His telephone communication was with the operator in the office of the yardmaster of the Des Moines Union Railroad Company. The duties of the operator are not shown, except as hereinafter stated; but it does appear that one Wilson was the local freight agent in Des Moines of the Des Moines Union, the Wabash, and the Milwaukee Railway Companies. His hours were from 7:30 a. m. to 6 p. m. There were two yardmasters who had charge of this track, owned or used jointly by the companies mentioned; one in the daytime and the other at night. The freight agent had no knowledge of the car being on the transfer track until 9:25 in the morning of November 28th, when the bill of lading was delivered to him by the Rock Island Company. It does not appear that the yardmaster had any knowledge thereof until about that time, although the operator in the yardmaster's office, whoever he may have been, had knowledge of the presence of the car the night before.

When Wilson, the local freight agent of the Des Moines and the Wabash Companies, received the bill of lading from the Rock Island Company the morning of the 28th, he discovered that the horses had been loaded the previous afternoon, had not been unloaded, fed or watered, and had already been upon the road something like nineteen hours. We now quote Wilson's testimony regarding the disposition of the car:

The bill showed that the car of horses had been on the cars somewhere about nineteen hours. It was immediately delivered to the Agar Packing Company to be fed and rested. I ordered the horses fed and watered and rested by the Agar Company stockyards people, which was done, and the horses reloaded in the same car on the morning of

November 29th, at 9 a. m. The first train that left Des Moines on the Wabash after the receipt of the billing from the Chicago, Rock Island & Pacific Railway Company covering this car was at 10 a. m. November 28th. The reason we did not send the car out on the Wabash on the morning of the 28th was that they had already been on the car about nineteen hours, and we didn't have sufficient time to get the shipment to its destination, or to the next feeding station, until the twenty-eight-hour limit was up, and I thought it was advisable to hold them and give the necessary feed and rest until the next day. . . . The next morning, when I got the bill, I had the horses taken out and unloaded. There was no reason why I could not have put them in the train, only I wanted to feed them. According to my information they had at that time been in the car from 2 o'clock the day before. I don't know how long they had been on our tracks. I fed them, and had them rested, and then started them to St. Louis. We had only one through train over the road each day. There was no other train that day by which they could have been forwarded to St. Louis. The first I knew of this was when I got the waybill at 9:25 in the morning.

The horses were sent out on the morning of November 29th upon the first train upon which they could be sent after being unloaded, fed and watered, and by reason of the delay in Des Moines the injury occurred. As is well known, the law requires that stock shall not remain more than twenty-eight hours without being unloaded, fed, and watered, and it is manifest that this was required at some place along the line of shipment. The usual running time between Des Moines and St. Louis over the Wabash is eighteen hours. It is apparent then that the horses had to be unloaded, fed and watered at some time during their transportation. It is claimed by plaintiff that according to a long-existing custom this duty devolved upon the Rock Island Company, and that by reason of the law and of a prevailing custom, defendant's responsibility did not cease until it had unloaded, fed and watered the



stock, and turned over the bill of lading or waybill for the stock to Wilson, who was the local joint freight agent of the Des Moines Union and the Wabash Companies, while on the other hand, defendant contended that its responsibility ceased when it set the car in upon the transfer track, and notified the agent of the Des Moines Union of the presence of the car upon the transfer track.

We now quote all the testimony on either side with reference to this matter. Wilson, the joint agent testified as follows:

Q. You may state, Mr. Wilson, how a carload of horses shipped from the initial point, say Winterset, over the Rock Island Road to Des Moines, and to be there transferred to the Wabash for transportation to St. Louis over the Wabash Line, you may state what the ordinary and customary manner of delivery to the Wabash Road is in Des Moines, if you know? A. The usual custom is that when a car of horses is received from connecting lines of the Rock Island en route for shipment to St. Louis via Des Moines and the Wabash Railroad, if they are to be fed at Des Moines, the line bringing them into Des Moines delivers them to the Agar stockyards soon after they arrive in Des Moines, and then immediately delivers the bill covering that shipment to the Des Moines Union freight office, and then the Des Moines Union sends a switch engine over to the Agar stockyards, and as soon as the stock is fed and rested, gets them on the first Wabash train that goes out for St. Louis. Q. Has that been customary during the four years of your agency and control of the Des Moines Union? A. It has been the custom for the last four or five years. I remember the carload of horses in question. It was delivered on the connecting track between the Des Moines Union and Rock Island. Q. Why didn't you move that car? A. We moved it as soon as we received the bill. I received the waybill covering this car of horses about 9:25 a. m., November 28, 1905, from the Chicago, Rock Island & Pacific. We then had the car of horses in our possession. Q. Do you feed stock at all shipped from Des Moines to St. Louis in ordinary reasonable transportation? A. No, sir; we do not.

Q. When would this car pass to the Des Moines Union?

A. Whenever we get the bill covering the shipment, we would handle it then.

Q. Does the Des Moines Union ever handle a car until the bill of lading is handed to you, or handle a car until the bill of lading between the Des Moines Union or any other road, and especially this defendant?

A. Not through cars.

Q. When a car comes in over the Rock Island for transportation to St. Louis, what is the first thing that is done with the car, and by whom, according to the customary manner of handling freight there in Des Moines?

A. The line on which the car arrives in Des Moines. It is the custom for them to deliver it to the connecting track for the Des Moines Union, and then the Des Moines Union, after they have the bill for it from that road, the Des Moines Union sends their engine up to the connecting track, and gets the car and puts it in position to be forwarded.

Q. I will ask you to state when a delivery is made of an incoming car in Des Moines to go out over a forwarding line, where is the feeding, if any, done, and by whom is it done, and does it precede the bill of lading?

A. The line bringing the car into Des Moines would arrange for the feeding with the stockyards, or somebody else, and then the receiving line of road would go out there and get the car from where it was fed, if it was the stockyards, and forward it.

Q. Are these stockyards maintained in Des Moines?

A. Yes, sir.

Q. Where all these railroads have an opportunity to feed before delivering to the Des Moines Union?

A. The stockyards are maintained and feed all the lines that reach them, and the Rock Island reaches them.

Q. Have you ever handled a carload of horses where the horses have not been previously fed by the line bringing them into the city before they had been delivered to you, and before the waybill had been delivered to you?

A. No, sir.

Q. And is the instance of this car the first that you have known where the feeding was not done before the bringing and delivering of the waybill to you?

A. It is the only case that I recall.

Q. The waybill was delivered to me at 9:25, November 28th.

Q. Then was when you took control of the car?

A. At 9:25 a. m.

Q. There was a freight departed at 10 a. m.

A. It is the custom when a car is delivered to us and a waybill, to give a receipt for

the waybill. Q. Did you execute to the Rock Island Company, on the morning of the 28th, a receipt for this waybill? A. I don't know that I personally gave a receipt. There was one given. I saw it. During the four years I have been connected with the company there has never been any specified delivery recognized by the Des Moines Union except the delivery of the waybill. . . . I don't know what time that car came onto our tracks or into our possession. I know that my office was not notified until we got the bill of lading, but I was not there. I simply know that I have no record of it. Of course I could not say positively whether they were notified or not. I don't know when they were put in our possession. Q. When does the Union attach its engine and enter upon the delivery of a car? A. A car is consigned over, as this car was, when we get the waybill. Q. When do you first, if ever, take control of a car? A. When we get the billing. Q. Now, Mr. Wilson, when the Rock Island brought that car from Winterset into Des Moines, whose duty was it to take that car to the stockyards and have them fed? A. It is the Rock Island's duty. Q. And when the bill of lading was delivered to you at 9:25 the next morning, where, in the ordinary or customary delivery or taking charge of the car, would you have found it? A. At the Agar Packing Company's stockyards. Q. And that is where you would have taken control of the car first for the transfer to the Wabash? A. Yes, sir. Q. Now, Mr. Wilson, I want to ask you if anybody about your office has authority to accept any other kind of delivery than the delivery to which you have testified to here in our presence, in your absence? A. No, sir. Q. Now you say that in your judgment it was a wise and proper thing to do when you first got control of that car the next morning by delivery of the waybill—in your judgment it was the proper thing to feed and rest the animals? Now you may state to the jury what was best in your judgment. A. According to law, as I understand it, it is a violation of the law to keep animals or horses inclosed in a car a longer period without feed.

Defendant's evidence in respect to this matter was as follows: Nesbit, who was its yard clerk at the time in

question, testified as follows with reference to the delivery:

I remember handling a car of horses that came into the Rock Island yards on the Rock Island train from Winterset in November, 1905. The car came in at 7:30 in the evening. Each car is handled with a waybill, which the conductor brings, and from the waybill the switching list is made up, and from that you know where the car is going. This car came in, and I took and marked on the side of the car so the switchman could switch it. I marked it, 'For St. Louis by the Wabash.' It was an open stock car, and you should see that horses were in it. The car was taken and placed on the Des Moines Union Transfer, so that the Des Moines Union could get this car and deliver it to the Wabash. I notified the operator at the Des Moines Union, and wrote it down in the book at 9 p. m. I notified him by telephone. I first asked for the yardmaster, and he said he wasn't in, and I asked the operator if he would tell him [the yardmaster] that this car was on the transfer, and he said, 'Yes, sir,' and I said 'All right.' I told him it was a car of horses, and had been placed on the transfer, and where it was going. I told him it was a car of horses for St. Louis by the Wabash. Exhibit D is the record kept by me in my official capacity in the employ there for the Rock Island. The record was made at the time. The record I made of this particular car of horses which came in from Winterset on November 25, 1905, was 'SWS 1801, horses from Winterset for East St. Louis.' This is the way we always handled transfers of this kind during the two years or more I was in the employ of that company. This record as to the number of the car was made from the switching list of the conductor and the waybill. This is the manner in which I located this particular car. The car contained horses. . . . I didn't notify anybody of the arrival of this car personally. I didn't deliver any paper to anybody. I didn't make out the bill Exhibit C, and I can not tell you who did make it out. I didn't have that bill in my possession. I didn't know what became of the one I had. With reference to the marks I put on this car, I indicated on the car in substance what I telephoned to the operator

in the yardmaster's office at the Des Moines Union. This is the way they handled the cars at that time, through chalk marks. This car was handled no different from the way we handled all cars at that time. The Des Moines Union always received these cars with chalk marks on them. This car was in the Rock Island switchyards, when I put the chalk marks on it. They were on there for the benefit of the Rock Island switchman. Exhibit C was not made in the Rock Island office or in the freight office. I don't know where the original waybill is. I didn't see it after I took it to the Rock Island freight office. That is not the original freight bill, but probably was copied from it. These chalk marks on the car was for the use of the Des Moines Union as well as the Rock Island switchman. They would not handle a car without marks on it. That is all they had to go by at that time. Anybody whose duty it became to handle it in Des Moines would be guided by these chalk marks. The Rock Island switchman, or any other switchman, would be governed by these marks.

Osborne, a switchman for the defendant, testified with reference to this as follows:

There was a car of horses came on the Rock Island from Winterset, Iowa, on the evening of November 27, 1905. I handled it by the chalk marks that were on the car. It was marked 'St. Louis via Wabash, 11-27-1905.' I placed it on the transfer on which I ordinarily place cars of this kind. The only way I had of knowing where to switch the car was the chalk marks that were on it, and it was for the employes of the Des Moines Union Railway Company, so that they could switch by these marks. In transferring these cars it was the custom to switch them according to these chalk marks. I never knew of the Des Moines Union refusing any cars with these marks on them. After I placed this car on the transfer I notified Mr. Nesbit. That was part of my duty when I had cars loaded with live stock. I made a record of handling that car that evening. It was handled at 8:50. Exhibit E is the record made on that car. The record I made was 'Car No. 1801, initials SWS.'

Plaintiff's damages, as alleged, consisted in injury to the horses by reason of being longer on the way than necessary, and also in loss of the market on Thursday, the 30th; the next market day being the Monday following, when some of the horses were sold at a considerably lower price than they would have brought on Thursday, while others, on account of being out of condition as a result of the unnecessarily long detention in the cars, were carried over at an expense until a later date, and sold at a further loss.

I. Remembering that there was no charge of any delay on the part of the Wabash Company after it in fact received the car of horses, save as the delay of the Des

1. RAILROADS:  
shipment of  
live stock:  
delay: dam-  
ages: evidence:  
instructions.

Moines Union was attributed to it, that Wilson was the joint agent of the Des Moines Union and the Wabash Railway Companies, and that there was no fault upon the part of either the Des Moines Union or the Wabash Companies, unless what the defendant did in setting the car upon the transfer track and notifying the operator in the yardmaster's office constituted a delivery to the connecting carrier, we go now to the instructions. It is true that in many of the instructions the trial court told the jury that the defendant was required to show seasonable delivery to the Wabash Company, but it also gave among others the following:

(9) It appears from the evidence that the horses in question were delivered to the defendant at Winterset, Iowa, for shipment to Des Moines, Iowa, and to be delivered in said city to the Wabash Railroad Company, and to constitute such delivery of the car and horses in question, they must have been passed by the defendant into the control of said Wabash Railroad Company, and so long as any essential act remained to be done by the defendant company to complete said delivery, the same could not be said to be complete. Hence, if you find from

the evidence that the customary delivery, as between the defendant and the Wabash Railroad Company, constituted, among other things, the delivery of a copy of the waybill of such shipment, and if you further find that the delivery of a copy of the waybill constituted a part of such delivery, and until it was presented and passed to the Wabash Company, there was no complete delivery of the car in question in behalf of the defendant, and if the delay, if any, in the delivery of the waybill was the cause of the unreasonable delay, if any, of said stock, then the defendant would be liable for any damages the plaintiff may have sustained thereby, growing out of the fact that said horses were unreasonably delayed, if they were, in their transportation to their destination.

(10) On the other hand, if you find from the evidence that it was the custom of the defendant company and the Wabash Railroad Company that delivery from defendant to said Wabash Company was done by delivering said car upon the transfer track between the defendant company and the Des Moines Union Railroad, and that said delivery was completed by such delivery upon said transfer track, and noting upon said car in chalk certain directions for the switching crews, and by notifying the operator at the Des Moines Union office of so placing said car, and you find that the freight agent of the Des Moines Union Railway Company was also the agent of the Wabash Railroad Company, and if you find the facts established as herein stated, and if you further find that the car and horses in question were so handled and transferred, and that upon arrival at Des Moines they were placed upon said transfer track, and that chalk marks were placed upon the car as a guide to the switching crews, and that some one in charge at the freight office of the Des Moines Union and Wabash Railroads was notified thereof, and if you find that no further act of defendant company was necessary to their delivery to the Wabash Railroad Company, and that all this was done without unreasonable delay, then the defendant company has complied with the contract, and done all that was required of it concerning said shipment and would not be liable herein for damages to plaintiff, and your verdict should therefore be for defendant.

(11) If you find from the evidence that the customary

delivery of stock from Winterset, Iowa, over the defendant company to the Wabash Company at Des Moines, Iowa, required that the horses should first be taken to the stockyards, and there fed and reloaded, and then delivered to the Wabash Company before its duty attached, and the defendant became relieved of any duty thereto, and if you find further that the ordinary course of transportation required all this to be done at a time before and sufficient to allow of said car going out on the first regular train on the Wabash, and if you further find that the defendant's negligence in these respects caused or contributed to an unreasonable delay in the arrival of said horses at the St. Louis stockyards, then the defendant would be liable for all approximate damages the plaintiffs may have suffered in consequence of said negligence, if such negligence has been established.

(13) You are instructed that said agreement or contract which was signed by plaintiff, providing against any liability by the railway company for any loss or injury to the horses beyond its own line of railway, is a valid and proper contract, and binds the parties. And if you should find from the evidence that the horses of the plaintiffs, which were shipped by them over the defendant's railway under said live stock contract, were in any way, or from any cause whatever, delayed or otherwise injured after said horses had passed beyond the line of the defendant's railway, and if you further find that the defendant company was not responsible for such delay or injury, then the defendant would not be liable herein to plaintiffs, and your verdict should be accordingly.

A review of the testimony shows that both parties treated delivery to the Des Moines Union Company as equivalent of a delivery to the Wabash Railway, and that no one was complaining of any delay on the part of the Wabash Company, save as it was responsible for the acts of the Des Moines Union. It shipped the stock as soon as received from the Des Moines Union, and there was no question regarding the time or place of the delivery of the stock by the Des Moines Union to the Wabash Company. The Wabash sent the stock out on its first train after the



stock was delivered to it, and there is no complaint of any delay on its part thereafter. Now the instructions quoted fully relieved defendant from responsibility in the event it delivered the stock to the Des Moines Union Company on the evening of November 27th. If there was not a complete delivery at that time to the Des Moines Union Company, but delivery was made according to custom on the next morning at 9:25, then the jury was authorized to find defendant liable. The testimony was all addressed to the delivery to the Des Moines Union Company, and no one claimed that either it or the Wabash Company was responsible unless delivery was made on the evening of the 27th, when the car was set on the transfer track. The instructions should be read with reference to the record quoted; and, when so read, it seems that defendant's rights were fully protected by the tenth, eleventh and thirteenth instructions quoted. We have set forth all the material testimony upon any of the questions at issue so as to have the full record before us. Upon this record it seems that there was nothing in the instructions which could have misled the jury. It is true that the court gave, among others, the seventh and eighth instructions reading as follows:

(7) The defendant in this case, under the provisions of the written contract, was required to transport the car of horses in question to the city of Des Moines, Iowa, and to there make delivery of said car of horses to the Wabash Railroad Company, over which they were to pass to St. Louis stockyards, and this the defendant was required to do without the negligent handling of said stock, and without unnecessary or unreasonable delay.

(8) The law requires that stock shall not remain in the car more than 28 hours without being unloaded, fed and watered; . . . and if you find that the defendant company delivered the stock in question to the Wabash Company upon the day of its arrival, then the defendant would be in no way liable for any delay occasioned on account of said stock being unloaded, fed and watered at the stock-

yards in Des Moines on the next day. But if you find from the evidence that the defendant company did not deliver said stock to the Wabash Company until the day following its arrival in Des Moines, and that by such delay it became necessary for the Wabash Company to then unload, feed and water said stock in order that the law above referred to should be complied with, and you further find that such unloading caused a delay to said stock, and you further find that such delay was caused by the failure of the defendant company to deliver said stock to the Wabash Company with reasonable promptness upon its arrival in Des Moines, then the defendant would be responsible for such delay.

But these, when read in connection with the ones heretofore quoted, were not likely, in view of the testimony which we have set forth, to mislead the jury. The agent of the Des Moines Union Company was also the agent of the Wabash Company, and a delivery to him was a delivery to either or to both companies. No one claims that there was any delay on the part of the Des Moines Union Company, unless there was a delivery of the car to it on the evening of November 27th. If there was a delivery at that time, this delivery was by the instructions treated as having been made to the Wabash Company. If the car was not delivered to either company until the morning of the 28th, then, and then only, was the jury authorized to find for the plaintiff. In other words, for the purposes of the case, delivery to the Des Moines Union Company was treated as the equivalent of delivery to the Wabash Company, and defendant was not charged under these instructions with any delay of the Des Moines Union, the connecting carrier.

The instructions must be construed with reference to the testimony presented, and not abstractly, or with reference to some abstract proposition. When so construed, it is manifest that the only real question in the case was this, Whose duty was it to feed and water the stock? They had to be fed

2. SAME: duty to feed and water stock.

and watered by some one during the course of transportation, and by one or the other of these three companies. In the absence of any custom to the contrary it was the duty of the company last receiving the stock during the twenty-eight-hour period to look after this matter. If by custom, however, that duty was undertaken by the Rock Island Company, the initial carrier before delivery to the next succeeding carrier, and it failed to perform that duty, and in consequence the stock was delayed in shipment, resulting in loss to the shipper, the initial carrier was responsible, and so the court instructed.

Moreover, if, either by law or custom, delivery to the connecting carrier could only be made by presentation of the bill of lading as the testimony tended to show, then as the delivery of the waybill was to the joint agent of the Wabash and Des Moines Union Companies, there was no prejudicial error in instructing regarding the delivery of the waybill to the agent of the Wabash Company. Appellant's counsel assume that the trial court was of opinion that the Rock Island Company could not escape liability, except that it showed timely and seasonable delivery to the Wabash Company, overlooking the fact that there was another connecting carrier for whose acts the Rock Island Company was not responsible. The record does not support this claim; but, if it did, no prejudice resulted to defendant under the facts disclosed when applied to the instructions given. It must be remembered that the Wabash Company did not undertake at any time to unload, feed and water the stock. These duties were performed by the Des Moines Union Company, and no negligence is charged against the Wabash Company with respect thereto. On this issue the Des Moines Union was, for all practical purposes, treated as the Wabash Company. Instruction 13, already quoted, seems to fully cover the objections made by appellant's counsel. The whole case seemed to turn upon the sufficiency of

the Des Moines Union on the evening of November 27th, the facts to show a delivery by the Rock Island Company to and a delivery to that company was treated as the equivalent of a delivery to the Wabash.

II. Among other things, defendant's contract provided: "Second, That the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour,

3. SAME: contract limitation of carriers liability. nor in season for any particular market. Fourth. That the second party shall assume all risk and expense of feeding, watering, bedding,

and otherwise caring for the live stock covered by this contract, while in cars, yards, pens or elsewhere, and shall load and unload the same at his own expense and risk."

With reference thereto the trial court instructed: "(14) The evidence shows that neither member of the plaintiffs' firm accompanied the car of horses in question. The provision of the contract Exhibit A, seeking to impose any duty in this respect upon the plaintiffs, is of no validity or effect, nor can the defendant charge the plaintiffs with any responsibility for such stock by reason of such provision in said contract, and you will therefore consider such provision of said contract for no purpose in this case." In this there was no error. *Powers v. R. R.*, 130 Iowa, 616; *Grieve v. R. R.*, 104 Iowa, 659.

III. Among others the trial court gave the following instruction: "(12) If plaintiffs have established that there was an unreasonable delay in the arrival of the horses in

4. CARRIERS OF LIVE STOCKS: liability for injury. question at the St. Louis stockyards, and if you find that the said horses were injured through neglect in the course of transportation,

and that both this unreasonable delay and injury to the stock in the transportation was caused, or materially contributed to, by the defendant, by acts of omission or commission, before there had been a proper and sufficient de-

livery of the horses by the defendant to the Wabash Company, then the defendant would be liable for the damages sustained by such unreasonable delay, and for any injury the horses sustained, even though such injury may not have developed until after said horses had passed into the hands of the Wabash Company, or after their arrival at their destination." The effect of this was to hold the defendant liable in the event delay was caused or contributed to by it, even though the injury to the animals may not have developed until the animals passed into the possession of the connecting carrier, or until after they arrived at their destination. In other words, it was held liable for the results of any negligence to which it contributed, although its conduct might not have been the sole cause of the injury. That this is the correct rule, see 6 Am. & Eng. Ency. of Law, 618, and cases cited. *Kinnick v. R. R.*, 69 Iowa, 665. It is a general rule that where two or more persons, either severally, or jointly and severally, contribute to an injury, each is liable for the entire damage sustained. 1 Thompson on Negligence, section 75, and cases cited.

IV. The instruction as to measure of damages reads in this wise: "If you find from the evidence that the plaintiffs are entitled to recover, then you will allow them

5. SAME:  
damages:  
instruction.

such sum in damages as they have shown they are fairly entitled to under all the circumstances and the evidence in the case, and in this connection you are instructed that you should allow them the difference between the market value of the horses in question, if they had arrived at the place of destination without unreasonable delay, and the market value of said horses when they did actually arrive at the point of destination. If you find that any of said horses were injured during their transportation, and you find that defendant is responsible therefor, then you will allow plaintiffs such additional sum as the value of such horses were reduced by

said injury. If you further find that there was unreasonable delay in the arrival of said horses at their destination, and that defendant was responsible for such delay, and that by reason thereof the plaintiffs were detained in St. Louis in securing a market for said horses, and that they were at expense for themselves and in keeping said horses until they secured such market, then you will allow them such further sum, as shown by the evidence, that they have expended for their own personal expenses for hotel bills, and for feeding and caring for the horses, until such market was secured, and also for the value of plaintiffs' time and services while detained in St. Louis in seeking a market for said horses, but you will only allow for the damages described in this paragraph after you have found by the evidence, if you do, that plaintiffs could have readily sold said horses in the market if they had arrived at their destination without unreasonable delay. And in any event you will allow plaintiffs no more, if you allow them anything, than they claim herein." This is complained of for the reason that, as defendant could not have anticipated such damages, it can not be held liable therefor. In this there is no merit. The action is not for breach of contract, but sounds in tort, and in such cases it need not be shown that the damages suffered were in the minds of the parties when the relation of carrier arose. The carrier was responsible for all such damages as naturally and proximately followed as a result of its failure to perform its duty, no matter whether apprehended by it or not. This is a fundamental doctrine requiring no citation of authorities in its support. But see, as closely in point, *Toledo Ry. v. Lockhart*, 71 Ill. 627, and *Balt. Co. v. O'Donnell*, 49 Ohio St. 489 (32 N. E. 476, 21 L. R. A. 117, 34 Am. St. Rep. 579).

We have gone over the record with care, and discover no prejudicial error. The judgment must therefore be, and it is, *affirmed*.

A. PUMPHREY, Plaintiff, v. D. M. ANDERSON, Judge,  
Defendant.

**Intoxicating liquors: ILLEGAL SALE: CONTEMPT: PLEADING.** An information charging the existence of an injunction against the sale of liquors in a certain building and city, and charging a violation thereof by a sale of certain specified intoxicants on such premises to certain named persons on a given day, is sufficiently specific as to time, place and buyers.

**Same: BURDEN OF PROOF.** Prohibition is the rule in this State and the burden is upon the party charged with the illegal sale of liquor to show that he was lawfully operating under the provisions of the mulct law; so that an information charging a violation of an injunctive order absolutely restraining defendant from keeping or selling intoxicants on certain premises, which alleges generally that sales were made thereon in violation of law is sufficient, without negating the existence of facts which might excuse the defendant.

*Error from Wapello District Court.*

TUESDAY, FEBRUARY 9, 1909.

THE opinion states the case.—*Annulled.*

*E. R. Acres* and *M. S. Odel*, for plaintiff.

*Jaques & Jaques*, for defendant.

SHERWIN, J.—This is a certiorari proceeding to test the validity of an order of the defendant acting as a judge of the district court of Wapello County in striking the plaintiff's petition, and in rendering judgment against him for costs, because of his failure to plead more specifically in response to the defendant's motion for a more specific

statement. The plaintiff filed an information in the district court of Wapello County, alleging, among other things, that on the 14th day of March, 1908, in a certain action then pending in the district court in said county, wherein one George W. Creath was plaintiff and J. H. Mack et al. were defendants, a temporary injunction was issued enjoining and restraining the said Mack from keeping, using and occupying a certain building in the city of Ottumwa for the "purposes of keeping, selling, giving away, or storing therein or on said premises or elsewhere in said county, or this judicial district, intoxicating liquors," and that said decree of injunction was then in full force and effect. The plaintiff further alleged in his petition that the said Mack since the rendition of said decree had kept and sold intoxicating liquors in his place of business in the said county on premises that the petition described, and that said sales were in violation of law and of the said injunction. It was further alleged that on the 21st day of July, 1908, "the said defendant did, in violation of law and of said decree, on the premises aforesaid, sell intoxicating liquors, to wit, beer, to A. G. Stebbins and W. M. Dunwoody, as affiant is informed and verily believes." There was a further general allegation of sales of beer, whisky and other intoxicating liquors to divers persons unknown to the plaintiff. On the allegations above set forth, the plaintiff asked that a warrant issue for the arrest of the defendant Mack, and that he be required to show cause why he should not be punished for contempt. The defendant appeared by counsel, and filed a motion for a more specific statement, in which he asked that the plaintiff be required to state more specifically in what manner defendant had violated said injunction, both generally and in making the alleged sales to A. G. Stebbins and W. M. Dunwoody. The motion also asked that plaintiff be required to give the details of the unlawful sales alleged generally to have been made. In



connection with this motion, the defendant Mack filed his own affidavit, in which he stated that the provisions of the mulct law had been complied with in the city of Ottumwa, that he had paid all taxes assessed against him, and that he was operating a saloon under and in conformity to said mulct law. He further stated in his affidavit that he was unable to prepare his defense to the information, or to subpoena witnesses in support of his contention that he was operating a saloon under the mulct law, unless he was advised as to the "time, place and to whom said alleged illegal sales were made." As we have heretofore said, the court sustained this motion, and, the plaintiff refusing to plead further, the information was dismissed.

There was error in sustaining the motion for at least two reasons: First, it will be noticed that the substance of the defendant Mack's affidavit was that the motion should

1. **INTOXICATING LIQUORS:** be sustained so as to advise him as to the  
**illegal sale:** time, place, and to whom the said alleged il-  
**contempt:** legal sales were made. The plaintiff in his  
**pleading.** information specifically described the premises where the illegal sales were charged to have been made, and he further stated that illegal sales were made to Stebbins and Dunwoody on said premises on the 21st day of July, 1908. So far, then, as these particular sales were concerned, the charge in the information furnished every requirement demanded by the defendant Mack. The allegation of illegal sales to these parties was in the fourth count of the information, and was clearly sufficient.

In the second place, the injunction, so far as appears from the information and the record before us, absolutely restrained the defendant Mack from keeping or selling intoxicating liquors on the premises in question, and under such restraining order the general allegation of sales in violation of law was sufficient. We have repeatedly held that prohibition is still the rule in this State, and that where a party charged

2. **SAME:** burden  
of proof.

with a violation of the prohibitory law wishes to excuse himself by reason of the provisions of the mulct law, or other exceptions to the law, he must bring himself within such exceptions by way of defense, and the burden of proving that he was within such exception rests upon him at all times and at all stages of the proceedings. In other words, it is the rule that such matter is wholly defensive and that the state is never called upon to negative the exceptions. If, in proceedings of this kind, the party charged with a violation of an injunction may require the plaintiff to specifically plead evidence, he may shift the burden of proof to the plaintiff, and thus evade the rule of law to which we have referred. In *McGlasson v. Scott*, 112 Iowa, 289, the sufficiency of an information in contempt proceedings similar to these was assailed because it did not specifically name the building wherein the liquor was sold, nor give the names of those to whom sales were charged to have been made, but it was held that the information was a sufficient compliance with the requirement of section 2407 of the Code. To support his ruling in the instant case, the defendant relies upon *Abrams v. Sandholm*, 119 Iowa, 583, but that case was an action in equity in which an injunction was sought to restrain the defendant from continuing a nuisance. The defendant alleged that he was the holder of a permit, and it was there said that upon that showing it was proper to require the plaintiff to allege more specifically the acts constituting the violation of the law alleged. There is a clear distinction between that and the instant case in this respect: The information in the instant case charged the violation of an injunction which was absolute in form, and the defendant Mack could not excuse himself by filing an affidavit that he was operating under the mulct law because a party may be attempting to operate under the mulct law and still be enjoined from keeping a place which has been shown to be a nuisance. Furthermore, as we have heretofore shown, the

fourth paragraph or count of the information was in all respects as specific as was required by the defendant Mack, and for that reason alone the court erred in dismissing the case.

The order is therefore annulled, and the case is remanded for further proceedings not inconsistent with this opinion.—*Annulled.*

141	144
141	506

M. W. GRIBBEN, Appellee, v. H. O. CLEMENT and M. A. CLEMENT, Appellants.

**Suretyship: INDEMNITY: EXTINGUISHMENT.** No change in the form

- 1 of indebtedness originally secured by mortgage will operate to release the mortgage so long as the identity of the debt can be traced; so that where plaintiff became surety for defendant's debt, taking a mortgage to indemnify himself against loss, payment by defendant of his debt with money borrowed from another source with plaintiff as surety, did not operate to terminate the suretyship and extinguish the mortgage.

**Same: ACTION OF SURETY: WHEN NOT PREMATURELY BROUGHT: LIMITA-**

- 2 TIONS. Where the surety on a note to a bank, to whom the debtor had given a note and mortgage as indemnity, had an account to his credit in the bank for more than the amount of the debtors obligation, and he agreed with the cashier that the sum due from the debtor which had matured should be charged to his account, his action against the debtor on his indemnity paper was not prematurely brought, although he did not formally pay the same until after suit was commenced; and, even if prematurely brought its actual payment before trial would entitle the surety to maintain the action on the filing of a supplemental petition showing that fact: nor was the action by the surety barred because payment by him of the debtors obligation was not pleaded within ten years from maturity of his indemnifying note and mortgage.

**Execution of instruments: ACKNOWLEDGMENT: DENIAL OF GENUINENESS**

- 3 OF SIGNATURE. Upon the acknowledgment of the execution of an instrument before a notary it becomes immaterial whether the signature was affixed by the grantor personally or by another; so that denial merely of the genuineness of the signature is insufficient to overcome the weight to be given the certificate.

*Appeal from Dallas District Court.*—HON. EDMUND  
NICHOLS, Judge.

TUESDAY, FEBRUARY 9, 1909.

THIS is an action to foreclose a mortgage purporting to have been given to secure a note for \$500. The consideration for the note and mortgage was that the plaintiff became surety for the defendant H. O. Clement for a like amount. There was a decree for the plaintiff against both defendants, except that no personal judgment was entered against defendant M. A. Clement. The defendants appeal.—*Affirmed.*

*White & Clark*, for appellants.

*D. H. Miller* and *R. S. Barr*, for appellee.

EVANS, C. J.—The note and mortgage sued on bear date of July 9, 1897. They purport to have been executed by both defendants, who are husband and wife. The note was drawn in ordinary form, and by its terms became payable in ninety days from its date. The real consideration, however, for the note and mortgage was that the plaintiff became surety for the defendant H. O. Clement. At the time of this transaction Clement was engaged in the business of buying and shipping stock. He maintained an open account at the Bank of Minburn, checking thereon for the payment of stock purchased, and depositing therein the proceeds of stock sold. We infer from the record that he was operating without capital, relying upon the proceeds of his sales to meet the checks issued for his purchases. To secure itself against loss by his overdrafts the bank required him to deposit with it as security a promissory note for \$500, to be signed by himself and a surety. The plaintiff became such surety, and Clement carried on his business

under this arrangement. This surety note was extended from time to time until January, 1901. At this time Clement's account at the bank was overdrawn nearly to the full amount of \$500, and Clement was unable to pay. For the purpose of obtaining funds to pay this overdraft a new note was executed for a like amount to the Bank of Dallas Center, and the plaintiff became surety on this note in lieu of the note originally given to the Bank of Minburn. With the proceeds of this note the overdraft account of Clement at the bank of Minburn was paid. The second note was extended from year to year until June 14, 1906. On this date another note for a like amount was executed by the same parties to the Bank of Minburn, for the purpose of obtaining money to pay the note at Dallas Center. The last note matured June 14, 1907. At this time the bank called upon the plaintiff surety to pay the same. The plaintiff at that time had an open account to his credit at such bank for more than the amount of the note. He orally directed the cashier to charge the amount thereof to his account, which the cashier orally agreed to do. This suit was begun on June 29, 1907. The plaintiff did not actually issue a check on his account for the payment of the note until September 26, 1907, nor was the note formally canceled by the bank until such date. The plaintiff first pleaded such formal payment in his reply filed September 27, 1907. A demurrer to his reply being sustained, he set up the same matter in an amended and supplemental petition filed November 18, 1907. The points relied upon by the defense may be stated briefly as follows: (1) That the suretyship indemnified by the mortgage terminated in 1901, when the overdraft account was paid at the Bank of Minburn, and that the mortgage was thereby discharged: (2) that plaintiff's only cause of action was set up in a supplemental petition, filed November 18, 1907, and that under the terms of the note and mortgage the statute of limitations had fully run before such date; (3) that no cause of action

accrued to the plaintiff until September 26, 1907, being the date on which he formally paid the debt for which he became surety, and that his suit was therefore prematurely brought and could not be saved by the filing of a supplemental petition; (4) that the defendant M. A. Clement never signed either the note or the mortgage, and that her purported signatures thereto are forgeries, and that such note and mortgage were fraudulently altered by the plaintiff. The whole controversy in the case turns about these points of defense, and we will consider them *seriatim*.

I. In his original petition the plaintiff declared upon his note and mortgage according to their terms. The consideration for such note and mortgage was developed by the later pleadings. There is no dispute in the evidence but what they were given to the plaintiff to indemnify against loss by reason of his suretyship for Clement. Clement himself testifies: "It was for any purpose that might come up. He might sustain a loss that might be good there against me. I will admit that they were given to protect Mr. Gribben, but it was not talked or understood at the time." The parties differ in their testimony in this respect, that the plaintiff claims that he received the note and mortgage at the time of their date and at the time he signed as surety. Clement testifies that he voluntarily gave the note and mortgage to the plaintiff some time subsequently. We think the contention of the plaintiff must be accepted in this respect. Counsel for appellants contend that when the overdraft was paid in 1901, and the \$500 note upon which plaintiff was surety was surrendered, the function of the security held by the plaintiff was fully performed, that his suretyship had terminated, and that he had sustained no loss by reason thereof. This argument rests upon the letter rather than upon the spirit. If Clement had paid his overdraft at the Bank of Minburn, and thus released the plaintiff from his suretyship, then doubtless appellant's position would be sound,

1. SURETYSHIP:  
indemnity: ex-  
tinguishment.

even though the plaintiff had afterwards voluntarily entered into another suretyship for a like amount. But in this case it was not so. Plaintiff was able to terminate his liability as surety on the first note only by becoming surety on another note, the proceeds of which should pay the first note. This only changed the form of his suretyship. Its substantial identity was not changed. To hold otherwise would be exceedingly technical. We hold, therefore, that the suretyship of the plaintiff on the successive notes throughout the period of ten years was a continuing suretyship. The mortgage, having been given as surety against any loss which the plaintiff might suffer, thereby continued as long as the suretyship. It is well established in this State that no change of form of the debt originally secured by mortgage will release the mortgage so long as the identity of the debt can be traced. *Chase v. Abbott*, 20 Iowa, 154; *Heively v. Matteson*, 54 Iowa, 505; *Port v. Robbins*, 35 Iowa, 208. In the case last cited a note secured by mortgage was surrendered, and in lieu thereof a new note with surety was accepted. It was held that the surety was entitled to the security of the original mortgage. If we were to hold otherwise as to the continuance of the suretyship, it would hardly avail the defendants. In such case it would logically follow that plaintiff's cause of action accrued in January, 1901. Plaintiff's liability on the surety note at that time became absolute. The defendant was unable to pay the overdraft. The money to pay it could only be procured upon the credit of the plaintiff. The plaintiff's rights and remedy in such a case were not confined to those that are implied by the law of suretyship. In this case the mortgage and note were an express promise to pay, and it would be competent for him to show in a court of equity the liability he had incurred in order to discharge the suretyship.

II. We will consider together the second and third points of the defense. The one is that the statute of limitations had run before plaintiff set up his cause of action in

a supplemental petition. The other is that his cause of action had not accrued until after he commenced his suit. These two propositions are not consistent, and one or the other, or both, must necessarily be fallacious. If plaintiff's cause of action had not accrued until September 26, 1907, then the statute of limitations did not begin to run until such time. If the statute of limitations had fully run at the expiration of ten years after the date of the maturity of the note according to its terms, namely, October 9, 1897, it must be because the plaintiff was entitled to maintain an action upon the note and mortgage in accordance with their express terms. On that theory it would be incumbent upon the defendants to plead the fact relating to suretyship as defensive matter. This theory will not avail the defendants, because the plaintiff did commence his suit in this form on the 29th day of June, 1907. If it was necessary for the plaintiff to set up, not only his note and mortgage, but to plead the facts in relation to suretyship and to aver payment, then his cause of action did not accrue until such averment could be made, and the statute of limitations would not commence to run until a cause of action accrued. On either theory the plea of the statute of limitations is untenable.

Was the suit prematurely brought? And if so, were the defendants entitled to a dismissal thereof on that account? As already indicated, the plaintiff did not draw his check for the payment of the note until September 26, 1907, although, as between him and the bank, it was deemed as paid by him and to be charged against his account as of the date it matured. No interest was charged or claimed by the bank after June 14th. This arrangement between the plaintiff and the bank was binding upon each of them. As between them it would be deemed a payment in a court of equity. Inasmuch as the arrangement was actually carried out later, and the note surren-



dered to the plaintiff long before the trial of this cause, defendant could not be prejudiced thereby. He does not claim that he was prejudiced. We would not therefore feel warranted in holding that the commencement of plaintiff's action was premature. If we should so hold, we do not think that such fact would entitle the defendant to a dismissal of the action. The old rule which required an action to be abated, merely because prematurely brought, has been borne down by the trend of modern decisions. Under the later decisions, if the plaintiff's cause of action is complete and mature before it comes to a hearing, he will ordinarily be permitted to try it out on its merits. If the action was prematurely brought, the court has full power to impose proper terms upon the plaintiff for the full protection of the defendant. The usual terms imposed are that plaintiff be required to pay all costs incurred prior to the maturity of his cause of action. If other terms ought in justice to be imposed, the court has plenary power in the matter. The rule is to permit a supplemental petition to be filed and to allow the case to proceed. See *Little v. Pottawattamie County*, 127 Iowa, 381; *Bloom v. Insurance Company*, 94 Iowa, 359. *Dennison v. Soper*, 33 Iowa, 183, was a case prematurely brought by a surety as plaintiff before payment of the note, and his action was ordered dismissed, although he had paid the note before the trial. In that case, however, the suit was brought, not only before the surety had paid the note, but seven months before the note matured. The ground of the dismissal was that the only liability of the defendant to the plaintiff was one implied by the law of suretyship, and under such law no liability existed until after maturity and payment of the surety debt. Even upon the state of facts existing in that case, we doubt whether it can be regarded as entirely consistent with the holding in later decisions. In the case of *Zalesky v. Home Insurance Company*, 102 Iowa, 621, the reasoning of the court was

grounded upon the express prohibition of the statute. The facts in that case were exceptional in that respect. As distinguishing the *Dennison* case from the one at bar it should also be noted that a distinction is recognized by the authorities between a case where the plaintiff surety has no other right or remedy than those arising by implication of law out of the suretyship relation and a case where the plaintiff has been expressly indemnified by a written contract. In the latter case the surety is entitled to avail himself of the express terms of the written contract of indemnity, and he may thereby obtain an enlarged remedy. For a collation of cases upon this subject, see 27 Cyc. 1067, 1068, and cases therein cited; 27 Am. & Eng. Enc. 474, and cases therein cited. In such a case it has been held that a surety mortgagee may foreclose his mortgage before paying his principal's debt, and obtain a decree ordering the proceeds of the foreclosure to be applied upon the debt. *Meeker v. Waldron*, 62 Neb. 689 (87 N. W. 539). The effect of such a decree would be to treat the mortgage, at the election of the surety, as security for the original debt. From any view of the case at bar, we must hold that plaintiff's case was neither barred by the statute of limitations nor prematurely brought.

III. It is earnestly contended that the purported signatures of the defendant M. A. Clement to the note and mortgage are forgeries. The testimony of Mrs. Clement

on this question consists of the following, and no more: "The signature M. A. Clement to this note, Exhibit A, is not my genuine signature. The signature M. A. Clement

to this mortgage, Exhibit B, is not my signature." This testimony was not contradicted by any other oral testimony. One Boyd also testified that in his opinion the signatures were not the signatures of this defendant. It is said in argument that the court found the signature on the note was a forgery. From such finding it is argued

3. EXECUTION OF  
INSTRUMENTS:  
acknowledg-  
ment: denial  
of genuineness  
of signature.

that there was necessarily a fraudulent alteration of the note on the part of the plaintiff, and that therefore his whole case should fail. We are not able to determine from the record that the lower court definitely made such a finding as here stated. There is no statement in the record to that effect. The court rendered no personal judgment against this defendant. The inference might therefore be drawn that the court found in her favor as to the alleged forgery of the signature to the note. The court, however, entered no personal judgment against either defendant on the note Exhibit A. This note did not represent a debt. It was simply a part of the form of security. The court determined the amount of the personal liability of H. O. Clement from the amount paid by plaintiff as surety in his behalf. It allowed the plaintiff 6 percent interest thereon, although the note called for 8 percent interest. It is undoubtedly true, however, that if the note, Exhibit A, was signed by the defendant M. A. Clement, it would render her subject to a personal judgment, not for the amount of the note, but for the amount of plaintiff's loss as surety. The court having failed to enter such personal judgment, it is perhaps the fair inference from the record that the court found that she did not sign the note. Does it necessarily follow that the plaintiff was guilty of a fraudulent alteration of the note so as to render it void? And does consistency require a finding that her signature to the mortgage was also a forgery? We think not. As to the alleged fraudulent alteration, we are well satisfied from the evidence that the purported signatures of Mrs. Clement were upon the note and mortgage when the plaintiff received them from her husband. If either signature was a forgery, the forgery had occurred before the instrument left the hands of the husband. As to the genuineness of the signature to the mortgage, it appears that the mortgage was duly acknowledged before one Bligh, a notary public, and had been on rec-

ord since 1901. Bligh had died before the trial was had, and no other person was found who could personally testify to the transaction. The name of Mrs. Clement was written in the body of the notarial certificate in the handwriting of Bligh. It has heretofore been held by this court that the certificate of a notary in such cases is entitled to great weight, and should not be lightly overcome. Such certification has been regarded as sufficient proof of the genuineness of the signature, not only to the mortgage, but to the note also. See *Mixer v. Bennett*, 70 Iowa, 329; *Herrick v. Musgrave*, 67 Iowa, 63; *Baily v. Landingham*, 53 Iowa, 722; *Van Orman v. McGregor*, 23 Iowa, 300; *Morris v. Sargent*, 18 Iowa, 90. The defendant denied only the genuineness of her signature. That of itself would not defeat her liability on the mortgage. She did not deny that she had appeared before a notary public and acknowledged the execution of the instrument in the manner certified to by him; and, if she had made such denial, it would not of itself necessarily be sufficient to overcome the weight of such certificate. If she acknowledged the instrument before the notary public, it was quite immaterial whether her name was put to it by her own hand or by the hand of another. It is true that the plaintiff himself did not see her sign the paper, nor is he able to produce any witness that did. He took the mortgage from her husband, assuming that the purported signature was genuine. He was doubtless imprudent in that respect. A more cautious man would have made himself certain of the genuineness of the signature in advance. But if the plaintiff had possessed such degree of prudence, he would probably not have become surety at all. It is the "man void of understanding" who "becometh surety for his neighbor." Proverbs xvii, 18. In any event the finding of the lower court is well sustained by the record.

The decree furnishes the defendants no legal ground of complaint, and it is *affirmed*.

**BARBARA KREISINGER V. THE CITY OF CRESTON, Appellant.****Municipal corporations: CARE OF SIDEWALKS: NOTICE: EVIDENCE.** On

- 1 an issue as to whether defendant city was chargeable with notice  
of the alleged defective conditions of its sidewalks, in time to have  
repaired the same prior to plaintiff's accident, it is held under the  
evidence to have been a question for the jury.

**Same: PERSONAL INJURY: DAMAGES: RECOVERY BY WIFE.** A wife may

- 2 recover as damages the expense of medicine and medical attend-  
ance incurred by reason of a personal injury resulting from the  
negligence of another, where she actually employed the physician  
and obligated herself to pay it on her own account; although  
ordinarily the husband is liable for such expenses and presumably  
such damages accrue to him.

**Same: DAMAGES: WHEN NOT EXCESSIVE.** Two thousand five hundred

- 3 dollars damages is held not excessive for injury to a woman forty-  
nine years of age and in previous good health, where she was  
confined to her bed for three months, incapacitated for her work  
and suffered pain and permanent disability.

*Appeal from Union District Court.*—HON. H. K. EVANS,  
Judge.

TUESDAY, FEBRUARY 9, 1909.

ACTION for damages resulted in judgment against de-  
fendant, from which it appeals.—*Affirmed.*

*L. J. Camp*, for appellant.

*D. W. Higbee* and *Thos. L. Maxwell*, for appellee.

LADD, J.—In the evening of April 25, 1906, at about  
10:30 o'clock, the plaintiff in passing over an apron in  
the sidewalk stepped in an opening left by a displaced

plank, or on a plank, which slipped from under her foot, and fell. The trial resulted in judgment against the city, awarding her damages. But three exceptions are interposed: (1) That the city was without notice of the defect in the sidewalk; (2) that an instruction directing the jury to allow plaintiff for medical attendance and medicines was erroneous; and (3) that the assessment of damages was excessive.

There was no evidence that the city had actual notice of the defect in the walk. Ought it, in the exercise of that degree of vigilance exacted from its officers, to have discovered the defect, and repaired the walk

1. MUNICIPAL  
CORPORATIONS:  
care of side-  
walks: no-  
tice: evidence.

prior to the accident. One witness testified that in the latter part of the winter he had "seen one board clear out at times; sometimes it was open and sometimes the boards were close together." Another testified that: "Prior to the time she got hurt, I had seen the boards kind of raised up. I saw the planks loose quite a little while prior to the time she was injured." Still another noticed the two boards were loose about a week before plaintiff fell. Surely, in view of the active duty of inspection devolving upon the city's officers, this evidence of the condition of the walk was sufficient to carry the issue to the jury. But it is argued that, as plaintiff had passed over it twice a day during eight months and had not discovered the loose plank, the city ought not to be held to have notice of them. She left her home for the restaurant at five in the morning, and ordinarily did not return until ten o'clock at night. As explained, she could not well have observed defects in the walk save when she returned during the day, which happened occasionally. It may have been light at five o'clock in August previous, as contended, but for all that appears the sidewalk was not out of repair at that time. Moreover, the inquiry is not whether she noticed the condition of the walk, but whether it was so

noticeable that the city in the discharge of its active duty in keeping it in reasonable repair should have discovered the loose planks, and fastened them before the accident. *Broburg v. Des Moines*, 63 Iowa, 523, relied on by appellant, is not in point, for in that case none of those passing along the street several times a day had noticed its dangerous condition, and the court held that the city was not bound to have known what no one else had been able to discover. Here, even though plaintiff had not observed, others, as the jury might have found, had noticed the loose plank in the walk for a considerable time previous, and the issue as to whether defendant ought to have known of and repaired the defect was for the jury.

II. The court instructed the jury to allow plaintiff "such sum for medicines and medical attendance as the preponderance of the evidence shows she has incurred."

a. SAME: personal injury: damages: recovery by wife.

Plaintiff participated in conducting a restaurant in the name of her husband and son. She had no independent occupation, but she did employ the physicians and personally agreed to pay them, and for this they trusted her. This was undisputed. Ordinarily, as the duty of caring for and maintaining the wife devolves upon the husband, such expenses are primarily his, and presumably such damages accrue to him. *Tuttle v. Railway*, 42 Iowa, 518; *Elenz v. Conrad*, 115 Iowa, 183; *Keller v. Lewis*, 116 Iowa, 369. Without approving the doctrine of the last two cases, it is enough now to say that the facts of this case clearly distinguish it therefrom. Where the wife has actually paid such expenses, there is no good reason for denying her the right to recover the same. If the defendant is liable therefor, it can make no difference whether payment is made to the husband or the wife if the latter has actually paid it from her separate means; for in that event the husband could not recover it again and the defendant would be in no danger of being obliged to pay a second

time. *City of Columbus v. Strassner*, 138 Ind. 301 (34 N. E. 5, 37 N. E. 719). In so far as the right to recover is concerned, it is immaterial whether the expense has been paid by the wife or has been personally incurred by her. If she has obligated herself to pay it on her own account, she is damaged to the extent of the reasonable value of the services and medicines, and is entitled to recover as though a *feme sole*. *Lucas v. Railway*, 92 Mich. 412 (52 N. W. 745); *Board of Commissioners of Shelby County v. Castetter*, 7 Ind. App. 309 (33 N. E. 986, 34 N. E. 687). The facts justified the instruction as given.

III. Appellant contends that the sum allowed as damages is excessive. At the time of the injury plaintiff was forty-nine years old, with an expectancy of twenty-

two years, weighed two hundred and twenty-  
3. SAME:  
damages: when five pounds, was in good health, and had  
not excessive. led an active and industrious life. She was

confined to her bed for three months after the fall, and has been unable to do any work since. She has become afflicted with varicose veins on the left leg, with lumps thereon as large as walnuts. As her circulation is poor, ulceration may follow. One kidney is displaced, and incontinence of the urine is likely to be permanent. The muscles which hold the abdominal walls seem to have pulled loose from the sternum so that she suffers from ptosis abdominalis, meaning the general letting down of the contents of the abdominal cavity. Aside from impairing her ability to move about, this causes pain at the stomach and injures the digestion. She also suffers pain where the ensiform cartilage connects the ribs to the breastbone. Appellant argues that her condition in large part at least is due to a general breaking down as the result of a previous life of toil, but there is no evidence to this effect in the record. Other causes are suggested, but the jury well might have found her condition traceable to injuries received when she fell, rather than to other causes possible,



though not to be inferred from the evidence adduced. In view of plaintiff's condition, it can not be said that the amount allowed as damages, \$2,500, is excessive.—*Affirmed.*

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WILLIAM OLIVER v. L. E. KNEEDLER and C. A. KNEEDLER, Appellants.

**Real property: BREACH OF CONTRACT: PLEADING.** A petition alleging  
1 the falsity of covenants of warranty in a deed and also a written tender of rescission, and asking damages to the amount of the consideration paid, presents an action for recovery of the consideration and not one for damages for breach of warranty.

**Same: RESCISSION: EVIDENCE.** In an action to recover the consideration paid for land in personal services, upon rescission of the contract because of failure of title, evidence of the value of the services rendered is admissible.

*Appeal from Woodbury District Court.*—HON. WILLIAM HUTCHINSON, Judge.

TUESDAY, FEBRUARY 9, 1909.

ACTION to recover damages resulting to plaintiff from the falsity of covenants of defendants as grantors in a deed of conveyance of certain lots to the plaintiff. On trial to the court without a jury, judgment was rendered against defendants for \$95 and costs, from which they appeal.—*Affirmed.*

C. R. Jones, for appellants.

Sullivan & Griffin, for appellee.

McCLAIN, J.—Plaintiff, being by trade a painter, entered into a contract with defendants, by which he was

to perform certain work for defendants in the line of his trade and receive in consideration therefor two lots stated to be of the value of \$150. The work was performed, and the defendants gave plaintiff a quitclaim deed, and, on a subsequent complaint of plaintiff that he was unable to raise money by mortgage of the lots held under such deed, they gave him a warranty deed. Almost immediately thereafter the plaintiff tendered a return of the warranty deed which had not been recorded, and demanded the value of the lots, stating in his written tender and notice of rescission that the deed conveyed no title to the lots. This tender and demand being refused, plaintiff brought this action, alleging the making in the deed of covenants of warranty and complete breach thereof and entire failure of title to the lots, and asking the recovery of damages to the amount of the consideration of such conveyance. To this petition the defendants demurred on the ground that there was no allegation that plaintiff had been disturbed in his quiet enjoyment of the property or evicted therefrom, and, on the overruling of this demurrer, defendants answered, admitting the conveyance, alleging title, and further alleging that the consideration for the conveyance did not exceed \$50. The court, after hearing the evidence, found that the value of the consideration for the conveyance was \$95, and rendered judgment for that amount.

I. The appellants contend that the action is for breach of warranty, and, as plaintiff has not been disturbed in his possession of the property under the deed, he has no right of action for more than nominal damages. But in the first place it appears that the plaintiff has not had possession of the lots under the deed. At the time of the conveyance, the right to occupy the lots for purposes of cultivation was in a third person, who had not attorned to nor recognized the right of plaintiff to such possession. In the second place, the action is not necessarily one for

damages for breach of warranty. It is true the plaintiff alleges the falsity of the covenants of warranty, but in connection therewith he also alleges a written tender of rescission, and, if the defendants had no title, plaintiff had his right for breach of the representations contained in these covenants to rescind and demand the consideration paid. The court found the action to be one for recovery of consideration, and not one for damages for breach of warranty, and we concur in his construction of the pleadings. Under these circumstances, it was proper to try the issue tendered by defendants' answer with regard to the amount of the consideration.

II. Treating the action as one for recovery of consideration paid on rescission of the contract to accept the lots in satisfaction of services rendered, there was no error in receiving evidence as to the value of the work done by plaintiff for the defendants, and the finding of the court as to this matter of fact is conclusive upon us.

There is no error in the record, and the judgment is *affirmed*.

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GEORGE H. HOLLISTER, Receiver, Plaintiff, MACKENZIE STEWART, Intervenor, Appellant, v. THE VERMONT BUILDING COMPANY and F. L. EATON, Receiver, Appellees.

**Practice in Federal Courts: APPLICATION OF STATE STATUTES: JURISDICTION: VALIDITY OF JUDGMENT.** Where there is no provision of the federal statute governing the service of notice or subpoena, the statute of the state on the subject where the federal court is held will govern, even in an equity action, if reasonable and adapted to the purpose; and where the federal court has applied the state statute, finding it sufficient to confer jurisdiction, the state courts will not reach a contrary conclusion: so that where the officers of a domestic corporation, residents of another state, absented themselves from the state and provided no place of business therein, and the federal court in a suit to dissolve the corporation

and appoint a receiver, in the absence of a federal statute, adopted the state statute as to service of notice on corporations and determined that it had acquired jurisdiction thereby, the judgment in the state court will be given effect and the receiver permitted to sue therein.

**Judgments: FRAUD IN OBTAINING SAME: JURISDICTION.** Where a default judgment against a corporation was set aside and a federal court entered a decree of dissolution and appointed a receiver, and thereafter an intervener caused the action in the state court to be redocketed, alleged ownership of the original cause of action and obtained judgment without notice to the receiver and without disclosing the previous history of the case, the judgment so obtained is held to have been without jurisdiction and should be set aside at the suit of the receiver on the ground of fraud.

*Appeal from Woodbury District Court.*—HON. J. F. OLIVER, Judge.

WEDNESDAY, FEBRUARY 10, 1909.

THIS is a proceeding by F. L. Eaton, as receiver of the Vermont Building Company, to set aside a judgment against said company obtained by the intervener; irregularity and fraud and want of jurisdiction being alleged. Defendant answered with a general denial, and pleaded a want of authority in the receiver to bring the proceeding, in that his appointment was had without jurisdiction. In the trial below judgment and decree was entered for the petitioner, F. L. Eaton, receiver, as prayed. The intervener, Mackenzie Stewart, appeals.—*Affirmed.*

*A. Van Wagenen*, for appellant.

*Hubbard & Burgess*, for appellee.

EVANS, C. J.—The Vermont Building Company was a corporation organized under the laws of the State of Iowa, with its principal place of business at Sioux City. It was organized for the sole purpose of erecting and

managing for profit a certain building known as the Masonic Block. Another corporation known as the Farmers' Trust Company was interested and active in promoting its organization, and for some time owned and held all of its common stock, consisting of six hundred shares. Its preferred stock consisted of three hundred and fifty shares, the larger part of which was owned by one William T. Honsinger, of the State of New York. The Farmers' Trust Company went into the hands of a receiver, G. H. Hollister. In 1897 Hollister, as receiver of the Farmers' Trust Company, brought an action on account against the Vermont Building Company, and obtained a judgment by default for something over \$3,000. Some time afterwards certain minority stockholders owning preferred stock brought a suit in equity to set aside such judgment as having been obtained by fraud and upon a fictitious claim. This suit is known in the record as No. 17,111. The plaintiffs in the equity suit filed application also in the original suit brought by Hollister asking to set the judgment aside. This latter application and the equity suit were consolidated and tried together, and a decree entered therein granting the relief prayed. The decree in the equity suit is not set out in the record, but a full copy of the petition upon which the decree was entered is set out; and, as against appellant, we must assume that the allegations of the petition in the equity suit were sustained in the decree. An order was also entered in the original suit vacating and setting aside the judgment. The decree in question and the order referred to were entered in September, 1901. From and after the entry of such decree Hollister treated the claim originally sued on by him as invalid and void, and canceled the same, and in 1903 made his final report as receiver of the Farmers' Trust Company, and received his discharge.

In the equity suit referred to the petition charged that Hollister was an officer of the Vermont Building

Company at the time that he took judgment against it by default. It was also charged that Hollister and Honsinger were working together against the interest of the Vermont Building Company for the purpose of gaining control thereof, to the detriment of the minority stockholders, and that the taking of the judgment by default was a part of such scheme. After the judgment referred to was set aside, Honsinger became the owner of all the common stock. At the annual meeting of 1904 he caused himself to be elected president of the corporation, and caused all other officers of the corporation to be elected, the same consisting of members of his family and his attorney, all of the same being residents of the State of New York. In the meantime there had been a foreclosure sale of the Masonic Block, which comprised all the property owned by the corporation, except a surplus of cash on hand as a part of the proceeds of the sheriff's sale. At the time Honsinger and his family became officers of the corporation the period of redemption from the sheriff's sale had not expired. The assets of the corporation consisted of something over \$13,000 in cash, and the equity of redemption. Honsinger closed the local office, removed all the books, papers, cash and property of every kind belonging to the corporation to the State of New York, and never made redemption from the sheriff's sale. After the issuance of a sheriff's deed to the purchaser, the minority stockholders brought a proceeding in the federal court sitting at Sioux City to wind up and dissolve the corporation, and to appoint a receiver to take charge of its affairs, and the petitioner, F. L. Eaton, was appointed as such receiver. The federal court entered an order prescribing the notice or subpoena to be served upon the corporation, and ordered that the same be served upon its president in the State of New York. Such service and return thereon having been made, the court entered a decree dissolving the corporation and confirming the appointment of Eaton

as receiver, which final order was made on the 9th day of December, 1905. On December 23, 1905, the intervenor Mackenzie Stuart, a son-in-law of Honsinger, and a resident of New York, appeared by attorney in the district court of Woodbury County, it being the last day of its November session, and caused to be entered upon the docket the former case of *Hollister, Receiver, v. Vermont Building Company*, which is the case whose title is carried at the head hereof. He filed therein an alleged petition of intervention, alleging that he had become the owner by assignment from Hollister of the cause of action originally alleged therein, and asked judgment therefor. He presented to the trial judge a letter written by Honsinger in the State of New York, as president of the corporation, stating that the claim was just, and that there was no defense thereto, and then and there obtained an entry of judgment as prayed. The trial judge had no knowledge of the past history of the case. The receiver of the corporation had no knowledge of this proceeding until the month of May, 1906, whereupon he filed his petition to annul and set aside the judgment entry. The principal defense urged against this proceeding is that Eaton is without authority to represent the defendant as receiver, because the court was without jurisdiction to appoint him. The alleged want of jurisdiction is based upon a want of service of notice upon the officers of the corporation, and we shall give our first consideration to this question.

I. As already indicated, the Vermont Building Company was an Iowa corporation, with its principal place of business at Sioux City. It was organized for the sole purpose of transacting business at Sioux City, and never did transact business at any other place. Its officers were all residents of the State of New York. They all absented themselves from the State of Iowa, and took therefrom

1. PRACTICE IN  
FEDERAL  
COURTS: appli-  
cation of  
State Statutes:  
jurisdiction:  
validity of  
judgment.

all the books, papers and property of the company. They provided no place of business for the corporation in the State of Iowa. The corporation could not be sued in the federal court in any other district than the Northern district of the State of Iowa. The contention of the intervenor is that the federal court for such Northern district could not acquire jurisdiction over the corporation, except by service of notice or subpoena *within the district*. His contention is that there is no federal statute which permits a notice or subpoena to be served in such a case in another State, and that the federal court, therefore, acquired no jurisdiction of the corporation by serving notice upon its president in the State of New York. If this contention be correct, the situation was unique. The corporation could not be sued in New York because it was in Iowa. Jurisdiction to sue it could not be acquired in Iowa because its officers were in New York. The course followed by the federal court was to recognize the fact that the federal statutes contained no provision applicable to the case. It, therefore, followed the provisions of the Iowa statute as to the service of notice upon corporations, and ordered that service be made accordingly, and it was done. The federal court held that this was sufficient to confer jurisdiction upon it. In pursuance of such notice it assumed jurisdiction and entered decree. In pursuance of such decree Eaton holds his office as receiver, and appears as such in this case. Shall we hold the proceeding void for want of jurisdiction in that court? The rule that practice in the federal courts will follow the statute of the state where such federal court is held has application ordinarily to law cases only. The rule is not regarded as binding upon the federal courts in equity cases. Nevertheless it has been held repeatedly that even in an equity case, "when there is no applicable provision of a federal statute, the procedure of the State statutes may be followed, if deemed reasonable and adaptable to the purpose." *To-*



*ledo Scale Co. v. Scale Company*, 142 Fed. 919 (74 C. C. A. 89); 1 Foster's Fed. Prac. (3d Ed.) 254. Where, therefore, the federal court does adopt the provisions of the statute of our State, in the absence of an applicable provision in the federal statutes, and follows the provisions of such statute, and finds it sufficient to confer jurisdiction upon it, we can conceive of no valid reason why we should reach a contrary conclusion. The course followed by the federal court seems to us as the rational and natural solution of the anomalous situation. The situation itself was purposely created by the persons whose interests would be subserved by defeating the jurisdiction of the appointing court.

II. It is urged by the appellant that the obtaining of the judgment in the manner in which it was done involved nothing more than an irregularity, and that this question could only be raised by motion filed before the succeeding term, and that the petitioner is therefore too late. This point is not well taken. It is putting it mildly to call the procedure adopted an irregularity. Not only was the court justified in finding that fraud was practiced in obtaining the judgment within the meaning of the statute, but we think there was an utter want of jurisdiction. The power of the court to expunge a record entered without jurisdiction exists independent of the statute, and without reference to statutory time. In this case, however, the petitioner did file his application within one year, as provided by the statute.

The judgment of the court below was right, and it is *affirmed*.

2. JUDGMENTS:  
fraud in ob-  
taining same:  
jurisdiction.

JAMES ALBERT TRACY, Appellant, v. WILLIAM A. RADEKE.

**Real property: BROKERAGE CONTRACT: CONSTRUCTION.** A commission contract for the sale of land which provides that the broker will use his best efforts to find a buyer, and that the owner will aid in every way possible, does not create an exclusive agency and deprive the owner of the right to sell; and upon a sale by the owner to a purchaser procured by himself the agent is not entitled to a commission.

*Appeal from Woodbury District Court.*—HON. WM. HUTCHINSON, Judge.

WEDNESDAY, FEBRUARY 10, 1909.

DEMURREE to a petition alleging a commission due on sale of land was sustained, and, as plaintiff elected to stand on the ruling, the petition was dismissed. Plaintiff appeals.—*Affirmed.*

*James Albert Tracy*, for appellant.

*Randall, Courtney & Harding*, for appellee.

LADD, J.—According to the petition, at the times in question the plaintiff was engaged in the real estate business at Sioux City under the name and style of Tracy Realty Company, and maintained co-operative offices in different places in Iowa, Minnesota, and the Dakotas, each actively co-operating with every other; defendant was owner of a quarter section of land in Lincoln County, Minn.; on September 28, 1906, a contract was entered into by the interchange of a proposition and acceptance in words following:

Tracy Realty Co., Sioux City, Iowa—Gentlemen: For 12 months, and till ten days after written notice, use your best efforts to get me a buyer for the N. W.  $\frac{1}{4}$  of section 12, township 109, range 45, Lincoln County, Minnesota, and I will aid in every way possible, and show farm free. [Here follows description.] For an acceptable purchaser, on agreeable terms, will give you \$1 an acre; or if you find such purchaser will pay you that, with the excess he agrees to pay, if any. [Signed] Wm. A. Radeke.

Received of Wm. A. Radeke, listing agreement of his property, consisting of the N. W.  $\frac{1}{4}$ , sec. 12—109—45, Lincoln County, Minn., together with his \$15, with the understanding that the undersigned will add \$15 of their money to it—making \$30—and spend it all in advertising said property for sale, and if quick sale is not thereby made, agree without further fee, to keep everlastingly at it to get a buyer till one is secured, or the owner says quit, and when the sale is made will credit the \$15 on the commission. Tracy Realty Co., by J. W. Alexander, Local Representative.

The petition farther alleged that plaintiff had performed his part of the agreement, and that on October 7, 1907, defendant had found a purchaser for the land to whom he had sold the same, and prayed judgment for \$1 per acre less the \$15 advanced. The ground of defendant's demurrer in substance was that the contract did not operate to deprive the owner of the right to sell his property nor permit plaintiff to levy tribute on him in event he should be able to find a purchaser. It will be noted that plaintiff is not given the exclusive agency, nor is there any express promise to pay a commission on a sale made by himself. The only ground for such an implication is found in the repetition in substance of the promise of compensation. These promises, however, are to be construed in connection with the context, and, when this is done, it will be found that the services mentioned for which compensation is to be made are plaintiff's best efforts "to get a buyer," and that defendant was merely "to aid in

every way possible." Fairly construed, this means that he was to aid plaintiff in such efforts, and has no reference to any independent effort on his part to sell the farm. The agreement differs so radically from that construed in *Metcalf v. Kent*, 104 Iowa, 487, that the case is not in point. As the proposition and acceptance did not deprive the owner of the right to find a purchaser for his property, the sale thereof was neither a performance nor violation of the terms of the contract. *Ingold v. Symonds*, 125 Iowa, 82. See *Tracy v. Abney*, 122 Iowa, 306.—*Affirmed*.

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HAMBRO DISTILLING & DISTRIBUTING Co., Appellee, v. J.  
J. PRICE & Co. ET AL., Appellants.

**Judgments:** PRESUMPTION AS TO REGULARITY. In the absence of any  
1 record of the evidence or proceedings had upon the trial every  
presumption will be indulged in favor of the regularity of the  
judgment.

**Appeal:** VARIANCE: OBJECTION NOT URGED BELOW. Where the parties  
2 in an action against a partnership alleged to consist of certain  
persons proceed to trial without impleading another, disclosed by  
the evidence to be a member of the firm, the variance between  
the pleading and the proof is not such that the answering de-  
fendants can urge it on appeal to defeat the action.

**Partnership:** SALE TO PARTNER: ACTION FOR THE PRICE. Where the  
3 answer to a suit for the price of liquor admits the purchase and  
offers no defense except that the sale to them was illegal, it is  
immaterial whether the person who acted for the firm in making  
the purchase was a member of the firm.

**Appeal:** FINDINGS OF LOWER COURT: PRESUMPTION. Where there is no  
4 abstract of the evidence it will be presumed on appeal that the  
findings of fact by the trial court were justified.

*Appeal from Mahaska District Court.*—HON. K. E.  
WILCOXEN, Judge.

WEDNESDAY, FEBRUARY 10, 1909.

ACTION to recover for goods sold and delivered. Judgment for plaintiff, and defendants appeal.—*Affirmed*.

*Liston McMillan*, for appellants.

*Frank T. Nash* and *Irving G. Johnson*, for appellee.

WEAVER, J.—The appellee is a wholesale dealer in liquors at the city of Baltimore, Md. It alleges that the defendants John J. Price and T. J. Price constituted a partnership under the style of J. J. Price & Co., engaged in business as pharmacists at Oskaloosa, Iowa, and that on March 6, 1905, at Baltimore, Md., plaintiff sold to said firm certain intoxicating liquors to the amount and value of \$159.35, and that the indebtedness so contracted has never been paid. The defendants in answer admit the purchase of the liquors, but allege that the sale was made in Mahaska County, Iowa, contrary to the laws of this State, and that action for the purchase price can not be maintained. Jury being waived, trial was had to the court, which made a finding of facts, in substance, as follows: That the firm of J. J. Price & Co. was composed of J. J. Price, T. J. Price and C. E. Cunningham, the last named of whom, as a member of said firm, had been granted a permit to buy and sell liquors for lawful purposes at Oskaloosa, Iowa; that on the date in question the said Cunningham for said firm gave the order for the liquors above mentioned; that said order was given subject to the approval of plaintiffs at Baltimore, and was in fact there approved, and the liquors shipped to defendants at Oskaloosa. On these facts the court found plaintiff entitled to recover, and judgment was entered accordingly.

The principal point urged upon our attention is the apparent variance between the allegation of the petition as to the members composing the partnership of J. J. Price & Co. and the finding of the trial court with respect there-

to. We discover no good reason for disturbing the judgment of the district court upon this ground. In the first place neither party has attempted to furnish this court any abstract of the evidence introduced, or any record of the proceedings had or rulings made upon the trial, and every presumption will be indulged, and every doubt solved, in favor of the regularity and propriety of the judgment entered. If the plaintiff mistakenly supposed and alleged that the firm was composed of J. J. Price and T. J. Price, and on going to trial the mistake was discovered, leave could properly have been granted to amend the petition to conform to the proof, or if the parties saw fit, without formal amendment, to proceed and try the case as if the name of Cunningham had been in fact impleaded as a partner in the concern, we think the answering defendants are in no position to allege a fatal variance in the proof. In the absence of any record of the evidence or the proceedings had at the trial we will presume that the action of the court in recognizing the partnership relation or agency of Cunningham was regular.

There is still another view of the record which the appellant seems entirely to overlook. Their answer admits the purchase of the liquors from the plaintiff by their firm, makes no pretense that the bill has ever been paid, and offers no defense whatever, except the allegation that the sale to them was made in violation of law. Such being the case, it is a matter of no consequence whatever whether Cunningham, who acted for defendant in making the purchase, was or was not a member of the partnership.

In the absence of the evidence we must also assume that the finding of the trial court that the liquors were purchased in Baltimore is correct. Such being the case, the judgment for the plaintiff must be sustained. *Westheimer v. Habinck*, 131 Iowa, 643.

For the reasons stated, the judgment of the district court is *affirmed*.

## H. E. McCOLLUM v. ROBERT McCONAUGHY, Appellant

**Courts: CONSTITUTIONAL QUESTIONS: DECISIONS OF FEDERAL COURTS AS**  
**I AUTHORITY: SALE OF LIQUOR: STATUTES.** Our state court is not bound by any provision of the federal constitution to follow a decision of the supreme court of the United States in passing upon the validity of a state statute, further than to recognize the obligation not to enforce a statute in violation of the constitution; but where the supreme court of the United States has held a statute constitutional, in contravention of a prior decision of the state court, and no property right has been acquired in reliance upon the decision of the state court, it will reverse its ruling to conform with that of the federal court; as where the state court held the statute prohibiting any person from soliciting orders for the purchase of liquor to be shipped by a nonresident direct to the purchaser as unconstitutional, because in conflict with the interstate clause of the federal constitution, which was subsequently held not unconstitutional in that respect by the federal court, the state court will overrule its prior decision so far as to restrain one from soliciting such orders. Overruling *State v. Hanaphy*, 117 Ia., 15, and *State v. Bernstein*, 129 Ia., 520.

**Same.** While an unconstitutional statute is invalid from the time of  
**2** its enactment; still a decision holding a statute unconstitutional may be overruled, thus rendering the statute effective because of the removal of the supposed objection.

*Appeal from Washington District Court.*—HON. B. W. PRESTON, Judge.

WEDNESDAY, FEBRUARY 10, 1909.

ACTION in equity to enjoin the defendant from continuing to maintain a place for carrying on the business of soliciting, taking and accepting orders for the purchase, sale and shipment of intoxicating liquors for and on behalf of a corporation located in Kentucky, thereby creating and maintaining a nuisance. A demurrer to the peti-

tion was overruled, and defendant elected to stand upon his demurrer, and refused to plead further, whereupon the court entered a decree as prayed, and defendant appeals.—*Affirmed.*

W. A. White, for appellant.

H. W. Byers, Attorney General, C. A. Dewey, County Attorney, and S. W. & J. L. Brookhart, for appellee.

W. H. Butterfield and Guernsey, Parker & Miller, *amici curiae.*

McCLAIN, J.—The acts which defendant was enjoined from committing or continuing were acts in violation of the provision of Code, section 2382, as amended by Acts 28th General Assembly, chapter 74 (Code Supp. 1907, section 2382), prohibiting any person from soliciting, taking, or accepting “any order for the purchase, sale, shipment or delivery of any [intoxicating] liquors”; and the sole question presented is as to the constitutionality of the statutory provision as applied to one who solicits orders for intoxicating liquors as the agent of a resident of another State, which orders are to be submitted to the principal in such other state and filled, if accepted, by shipment of the liquor ordered directly from such other State to the purchaser in this State. In the case of *State v. Hanaphy*, 117 Iowa, 15 (followed in *State v. Bernstein*, 129 Iowa, 520) it was held that this statutory provision was unconstitutional, on the ground that it was an unwarranted restraint upon freedom of interstate commerce, and therefore in violation of article 1, section 8, of the Constitution of the United States. It is conceded that, unless the cases above cited are to be overruled, the demurrer in this case should have been sustained; but the contention for appellee is that in the recent case of *Dela-*



*mater v. South Dakota*, 205 U. S. 93 (27 Sup. Ct. 447, 51 L. Ed. 724), the Supreme Court of the United States has upheld the constitutionality of a State statute imposing a license tax upon the business of soliciting orders for the shipment of liquor to a purchaser from another State, as against the objections which were held to be controlling in our prior decisions, and that, as the final tribunal in the construction of the federal Constitution has interpreted it as not precluding such legislation, we should now sustain our own statute and overrule our former cases. It is evident from the reading of the opinion in the *Hanaphy* case that the controlling consideration in reaching the conclusion that the statute was unconstitutional was the interpretation which it was thought the Supreme Court of the United States had given to the interstate commerce clause of the federal Constitution as affecting the validity of the statute, and that if the recent decision had then been announced, and had been considered by this court as applicable to the legislation in question, a contrary decision would have been reached. We have then only two questions to consider: First, whether the recent decision of the United States Supreme Court sustains the validity of such a statute as ours against the objection that it is an undue interference with interstate commerce; and, second, whether we should on that account overrule our previous decisions, and sustain as valid the statute which was in those decisions held to be unconstitutional.

I. The statute of South Dakota which was under consideration by the Supreme Court of the United States in its recent decision provided for the punishment, as a misdemeanor, of the act of carrying on "the business of selling or offering for sale" intoxicating liquors within the state, "by any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons," without paying an annual license charge imposed by the statute; and it is argued that a decision sustaining this statute is

not applicable to our statutory provision entirely prohibiting the soliciting, taking, or accepting, orders for the purchase, sale, shipment, or delivery of such liquor, for the reason that the South Dakota statute was a mere regulation or license in the exercise of the police power, while our statute is absolutely prohibitory. An examination of the decision, however, shows clearly that no such distinction as this was in the mind of the Supreme Court in holding the South Dakota statute to be constitutional. In the opinion it is said: "It would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent, into such other State there in defiance of the law of such state to carry on the business of soliciting proposals for the purchase of intoxicating liquors"; and it is further said that the contention for the invalidity of the South Dakota statute "ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another liquor for his own use, and the plenary authority of the State to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another State, even although such orders may only contemplate a contract to result from final acceptance in the State where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court." It is not necessary to here repeat in full the reasons given by the Supreme Court for its conclusion. It is enough to say that the court unqualifiedly commits itself to a line of reasoning with reference to the South Dakota statute which, if applied to our own statute, would fully sustain it as against the claim that it is in violation of the interstate commerce clause of the federal Constitution. We have no question whatever that had the view of the Supreme Court of the United States as now announced been before

us when the *Hanaphy* case was decided, we should have sustained our statute as constitutional, instead of holding it to be invalid because in violation of the federal Constitution.

II. We are of course not bound to follow the views of the Supreme Court of the United States in passing upon the validity of our statutes further than that we recognize our obligation not to enforce a statute which is in violation of the Constitution of the United States. We are not bound, therefore, by any obligation imposed upon us in the federal Constitution to uphold a State statute merely because, in the view of the Supreme Court of the United States, it is not unconstitutional. But on the other hand, when we have held a State statute to be unconstitutional because in supposed conflict with the Constitution of the United States, and the Supreme Court of the United States has so interpreted the federal Constitution that the supposed conflict is found not to exist, there is no good reason why we should not change our rulings so as to sustain the policy of the statutes of the State. We may, as we sometimes have done, reach the conclusion that our previous decisions are wrong, and should be overruled; and, when we find that the previous decisions are not in conformity with the law (no property rights having been acquired in reliance on such previous decisions). we feel it to be our duty to overrule them, and to announce such rule as we think should have been announced in the previous cases. Here there is no property right involved, for the lower court simply enjoined the defendant from pursuing the occupation of soliciting a particular kind of orders for the purchase of a particular class of property. The defendant was charged with carrying on the prohibited business at his residence, and nothing was in fact affected by the decree save the prevention of the soliciting or taking of such orders. It is plain, therefore, that defendant had ac-

quired no right in reliance on our previous decisions in the nature of a vested right to property.

The argument that our statute became invalid by reason of our prior decision, and can not now be enforced without re-enactment, is entirely without weight. It is true that an unconstitutional statute is, so far as it is unconstitutional, without force from the time of its enactment, but the decisions of the court holding it to be unconstitutional may be overruled, and the supposed unconstitutionality may thus be found not to exist. There is nothing to prevent a court from overruling its own decisions and rendering them of no force and effect as precedents in other cases. That a statute which has been held unconstitutional, either *in toto* or as applied to a particular class of cases, is valid and enforceable after the supposed constitutional objection has been removed, or in cases in which the objection is not applicable, is well settled. *In re Rahrer*, 140 U. S. 545 (11 Sup. Ct. 865, 35 L. Ed. 572); *Blair v. Ostrander*, 109 Iowa, 204; *Allison v. Corker*, 67 N. J. Law, 596 (52 Atl. 362, 60 L. R. A. 564).

We reach the conclusion that, in view of the final expression of view on the subject given by the Supreme Court of the United States, as above indicated, the cases of *State v. Hanaphy* and *State v. Bernstein*, so far as they are predicated upon the unconstitutionality of the statute in question as in conflict with the interstate commerce clause of the federal Constitution, should now be overruled, and the judgment of the trial court is therefore *affirmed*.

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JOHN SIMMONS, Appellee, v. B. A. DOLAN, Appellant.

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141	229

**Justice of peace:** CONTINUANCE WITHOUT CONSENT: JUDGMENT: INVALIDITY. A default judgment rendered upon a date to which a cause pending before a justice was continued without the consent of defendant or his counsel is void.

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**Same: APPEAL: REMAND: LAW OF THE CASE.** Where there has been an  
2 affirmative holding on pleadings unchallenged both in the district  
court and on appeal, that a justice's judgment was valid, the hold-  
ing is conclusive on a second trial.

**Appeal: JUDGMENTS: PRESUMPTION AS TO VALIDITY.** Where no rea-  
3 son appears that the judgment of a justice was invalid, and the  
only proper ground on which the district court on appeal could  
have discharged the garnishee under the judgment was that the  
debt was exempt to defendant, it will be presumed on appeal to  
the supreme court that the district court properly held the judg-  
ment valid.

*Appeal from Lee District Court.*—HON. HENRY BANK, JR.,  
Judge.

THURSDAY, FEBRUARY 11, 1909.

SUIT in equity to set aside a judgment obtained by  
defendant against the plaintiff before a justice of the  
peace of Lee County, Iowa, upon the ground that the  
justice had no jurisdiction of plaintiff herein. Defendant  
filed a general denial, also pleaded a former adjudication,  
and interposed a plea in abatement based upon another  
action pending. The trial court set aside the judgment,  
and defendant appeals.—*Reversed and remanded*

*A. L. Parsons and Bernard A. Dolan, for appellant.*

*F. T. Hughes and F. M. Ballinger, for appellee.*

DEEMER, J.—The action which resulted in the judg-  
ment which plaintiff seeks to have cancelled and set aside  
was commenced before a justice of the peace in May of  
the year 1905, and it was continued from time to time  
down to some time in August, when it was continued in-  
definitely. It is claimed, and the justice's docket shows,  
that some time in the latter part of August the cause

was continued until August 28, 1905, by agreement of the parties. On the last-named date plaintiff in the action appeared, but defendant therein did not, and judgment was rendered against him by default. It is this judgment which plaintiff herein seeks to have set aside upon the ground that neither he nor his counsel agreed to the continuance until August 28th, that they had no notice of such hearing, and that the justice lost jurisdiction by reason of an indefinite postponement of the case until some time about the middle of August.

This issue raises simply a fact question: Did defendant or his counsel in that case agree to a continuance of the case until August 28, 1905? This is affirmed on

1. JUSTICE OF THE PEACE: continuance without con- sent: judg- ment: invalidity.	the one side and denied on the other. Of course, if the defendant did not agree to this continuance, the judgment rendered by the justice is void for want of jurisdiction
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of the defendant in the suit. *Rowley v. Baugh*, 33 Iowa, 201; *Spear v. Fitchpatrick*, 37 Iowa, 127; *Balm v. Nunn*, 63 Iowa, 641. Defendant also pleaded an adjudication of this issue in a garnishment proceeding under an execution issued upon the justice's judgment against the Taber Lumber Company, wherein it was held that the judgment now in question was and is valid. He also pleaded another action pending. This action is another garnishment proceeding growing out of a subsequent garnishment of the Taber Lumber Company, which proceeding was pending at the time this action was commenced, and which was not dismissed until after the submission of this equitable action. It appears from the record that in the first garnishment proceeding, which was had before the justice rendering the judgment, plaintiff herein filed a motion to discharge the garnishee for the reason that the justice had no jurisdiction to render the original judgment, and that said judgment was and is void, and for the further reason that the money in the hands of the garnishee was exempt

to the judgment defendant as his personal earnings within ninety days. This motion was submitted to the justice, and overruled on all grounds save the one asserting that the judgment was void. Plaintiff in the garnishment sued out a writ of error to the district court, and, when the cause reached that court, defendant in the justice's judgment, plaintiff in this case, filed a motion to quash the writ of error for the reason that the original judgment rendered by the justice was void. The district court, after a full hearing upon the writ, made and entered the following judgment: "This day this cause coming on for hearing on the writ of error, the court, being fully advised in the premises, finds that the justice erred in holding said judgment void. It is therefore ordered that the cause is remanded to the Justice J. S. Burrows, with direction to consider and hold said judgment a valid and subsisting judgment, and that the execution issued thereon is valid and binding on the parties herein, and that the defendant pay the costs of this proceeding, taxed at \$——." That proceeding was appealed to this court, where the action of the district court in finding the judgment valid was approved and affirmed, but the cause was remanded in order to determine the question of the exemption of the debt owing by the garnishee. See *Dolan v. Simmons*, 139 Iowa, 64. It does not clearly appear what became of the cause after the remand by this court; but we take it that the garnishee was discharged. Whilst the record is in a somewhat confused state, we understand that thereafter another execution was sued out of the district court, which was served by again garnishing the Taber Lumber Company, that defendant in the judgment moved to dissolve because the amount owing him by the Taber Lumber Company was exempt, and for the further reason that the judgment was void, and that this proceeding was pending until after the submission of this case to the trial court, where it was dismissed.

The record also shows a garnishment in a case called No. 8,311, an answer filed by the defendant therein, plaintiff here, which pleaded the invalidity of the judgment and the exemption of the debt. It also shows a reply filed by plaintiff in garnishment and an entry of the justice ordering the discharge of the garnishee. It also appears that appeal was taken to the district court, where plaintiff herein moved to discharge the garnishee because on the face of the judgment, and upon the issues made by the pleadings, judgment should be rendered for the garnishee. This motion was submitted to the district court and by it sustained on January 8, 1907, and the garnishee was discharged. The garnishment proceedings growing out of the execution sued out in the district court which seem to have been pending down to the time of the entry of the decree herein are pleaded by way of abatement. These facts present two propositions for our consideration: (1) Was there an adjudication of the validity of the justice's judgment; and (2) Should the action have been abated because of the pending garnishment proceedings. It seems to us that these questions must both be answered in the affirmative. In the first garnishment proceeding there was an express and affirmative holding upon issues properly tendered, or at least upon pleadings which were not challenged, both in the district court and before us on appeal, that the original justice's judgment was valid and binding. This was an adjudication of that matter on issues tendered by proper parties, and the finding is conclusive.

2. SAME: appeal:  
remand: law  
of the case.

But it is said that there was another judgment subsequent to this by the district court finding that the judgment was invalid. It is true that a motion discharging the garnishee upon the pleadings and admissions of the parties was sustained, but this, as we view it, was bottomed solely upon the fact that the debt owing by the garnishee was exempt.

3. APPEAL:  
judgments:  
presumption  
as to validity.



True, the judgment does not expressly so recite, but we must presume that the district court made a proper holding that the justice's judgment was valid. The only proper ground upon which it could have discharged the garnishee was upon the theory that the wages were exempt from execution. The entry made by the district court was the discharge of the garnishee, and not a finding that the judgment was invalid. There was no foundation for a finding that the judgment was invalid for the reason that this was not confessed by the defendant in the original judgment, but expressly denied by him. The garnishment proceedings in the district court in which defendant in the original judgment was claiming that it was void and of no effect was pending until long after the submission of this case, and was not dismissed until the day the trial court entered its decree in this case finding the judgment void. From this recitation of the record it clearly appears that there has been a valid and binding adjudication of the validity of the justice's judgment in the first garnishment proceeding, both in the district court and here, upon appeal upon issues properly tendered, and to which proceedings both plaintiff and defendant herein were parties, and that this should conclude the matter. *Dewey v. Peck*, 33 Iowa, 242; *Bedwell v. Gephart*, 67 Iowa, 44; *Murphy v. Cuddihy*, 111 Iowa, 645; *Hogle v. Smith*, 136 Iowa, 32. That the plea in abatement was good, see *Carney v. Reed*, 117 Iowa, 508; *Costello v. Costello*, 112 Iowa, 578; *Guinn v. Elliott*, 123 Iowa, 179.

It is with regret that we are again compelled to reverse this case; for, as we said on the former appeal, the amount is small and the successful party will not reap any pecuniary reward. But we can not disregard established rules of law. The validity of the original justice's judgment was twice affirmed before courts of competent jurisdiction before this suit was brought, and plaintiff herein must be content with that finding.

The decree must be reversed, and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

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OTTO F. MONSON, Appellant, v. MATHIAS C. CARLSTROM.

**Appeal:** REVIEW OF INSTRUCTIONS: PRESUMPTION. Where the abstract  
1 on appeal contains none of the evidence, it will be presumed that  
the instructions which are a correct statement of the law had  
support in the evidence.

**Brokers:** RECOVERY OF COMMISSION: PROOF OF SERVICE. A broker cannot  
2 recover a commission for procuring a purchaser for property on  
proof simply that the purchaser overheard a conversation between  
the broker and another, thus learning that the property was for  
sale, and then without solicitation by the broker negotiated a purchase  
direct from the owner.

**Same:** INSTRUCTION. One who contracts to procure a purchaser for  
3 property is not required to show an actual sale to recover his  
commission, but when a sale was in fact made he must show that  
he procured the purchaser and was thus instrumental in effecting  
the sale; and an instruction to that effect is held not misleading as  
requiring the broker to show more than procurement of the purchaser.

*Appeal from Woodbury District Court.*—HON. FRANK R.  
GAYNOR, Judge.

THURSDAY, FEBRUARY 11, 1909.

ACTION to recover a reasonable commission in the sum of \$125, under contract for procuring the purchaser to whom defendant effected a sale of real property. The allegations of plaintiff's petition were denied, and there was a trial to a jury, resulting in a verdict for defendant. From the judgment entered on such verdict plaintiff appeals.—*Affirmed.*

Andrew G. Lehr, for appellant.

No appearance for appellee.

McCLAIN, J.—No portion of the evidence is set out in the abstract, and the only questions presented for our consideration involve the correctness of the instructions. Plaintiff alleged that under a contract with defendant he procured, as purchasers for defendant's property, two persons named. The court instructed the jury that the contract between plaintiff and defendant was established without controversy, and that it appeared from the evidence that defendant had conveyed the property described in plaintiff's petition to one of the persons named by plaintiff; and the court then told the jury that, to entitle the plaintiff to recover a commission on account of such sale, he must prove that the person to whom the sale was made "was so procured, and induced to enter into negotiations and make such purchase, by and through the efforts and influence of plaintiff," and that it would not be sufficient for plaintiff merely to show that such person became aware that the property was for sale by overhearing some negotiations between the plaintiff and another person, to whom the plaintiff was endeavoring to make a sale. The court further instructed the jury that, if plaintiff entered into negotiations with both the persons named by him, and sought to induce them to purchase the property, and that as a result the one who did make such purchase was induced to enter into the negotiations which culminated in a sale of the property to him, then plaintiff was entitled to recover, but that plaintiff could not recover if such negotiations were with the one of the persons named who did not make the purchase, and that the one who did make the purchase was not a party thereto, and was not in any way solicited, advised or induced by the plaintiff to enter into negotiations with the defendant for the purchase of the property.

I. As appellant has failed to include the evidence,

or any portion thereof, in the abstract, we must assume that there was evidence justifying the giving of the instructions so far as they are correct expressions of the law; and, if under any state of facts they would have been correct, we must presume there was evidence of such facts on which to predicate them.

1. **APPEAL:**  
review of  
instructions:  
presumptions.

We are justified, therefore, in assuming that there was evidence tending to show that the only connection between plaintiff's act and the sale which was in fact made

2. **BROFERS:**  
recovery of  
commission:  
proof of  
service.

by defendant was that the person who became the purchaser, without any solicitation from the plaintiff or communication between him and the plaintiff on the subject, ascertained, by overhearing plaintiff's conversation with another, that defendant's property was for sale, and then proceeded on his own motion to enter into negotiations with defendant for its purchase. We are clear that under such a state of facts plaintiff would not be entitled to recover a commission for procuring a purchaser, and the instructions of the court were in this respect correct. The cases relied upon for appellant are not in point. In no one of them is it suggested that there had been no solicitation of the purchaser by the agent, or communication by the agent to the purchaser of the fact that the property was for sale. In the case before us we must presume there was evidence tending to show that nothing which was done by the plaintiff had any proximate connection with the purchase of the property.

II. Under the facts as recited in the instructions, and which we must presume to have been established without controversy, there was no error in saying that plaintiff

3. **SAME:**  
instruction.

must show that the actual purchaser was procured and induced to enter into negotiations and make the purchase through the efforts and influence of the plaintiff. It is true, as contended for appel-

lant, that one who contracts for a commission for procuring a purchaser need not show that a sale was in fact made to the purchaser thus procured, but it appears here that a sale was in fact made, and the only question for the jury under the instructions was whether such purchaser was in fact procured by plaintiff. Under such a state of facts the instruction could not possibly have misled the jury into thinking that something more must be shown by plaintiff than the procurement of a purchaser. If he had established that fact, then under the instructions he would have been entitled to recover.

There seems to be no error in the instructions given, and the judgment is *affirmed*.

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JOHN P. O'MALLEY, Appellee, v. DILLENBECK LUMBER Co., and CHICAGO, MILWAUKEE & ST. PAUL R. R. Co., Appellants.

**Highways:** DEDICATION BY PAROL: EVIDENCE. A highway may be dedicated by parol without deed or other written evidence thereof, but the intent to dedicate must clearly appear and the acts and circumstances relied upon to show intent must be unequivocal and convincing. Evidence held insufficient to show dedication.

*Appeal from Perry Superior Court.*—HON. W. H. FAHEY, Judge.

THURSDAY, FEBRUARY 11, 1909.

ACTION at law to recover damages because of the acts of the defendants in obstructing an alleged public highway. Verdict and judgment for the plaintiff for the sum of one cent, and the defendants appeal.—*Reversed*.

*White & Clarke and Cook, Loomis & Tourtellot*, for appellants.

*Shortley & Kelly and J. J. Halloran*, for appellee.

WEAVER, J.—On the line of the defendant railway company's road in Dallas County, Iowa, is a small station known as "Bouton." The railway there extends east and west. The station is on the south side of the track, and immediately west of the platform the railway yard is crossed by the principal street of the village extending north and south. On the north side of the right of way, and immediately west of the north and south street, the railway company owns an additional strip about one hundred and twenty-five feet in width and eight hundred feet in length, the east portion of which, in part at least, has been occupied by the defendant lumber company with its sheds and other conveniences of a lumber yard. Immediately north of the strip above described is a tract of unplatted land owned by the plaintiff, whose residence is upon a lane extending north from the north line of said strip at a point some forty rods west of the north and south street first above mentioned. Between the lane on which plaintiff resides and said first-mentioned street, where all the business houses are located, there is no direct convenient connecting street or highway, unless it be the one in controversy, which we now undertake to describe. It is the claim of plaintiff that there is a public way sixty feet in width extending along the line between his land on the north and the railway company's premises on the south; the partition line between them being the center of such way. He alleges that the same was established as a public road first by the consent and dedication of himself and the railway company, and that soon thereafter a petition for its establishment by public authority was filed with the county auditor, who appointed a commissioner to

view the proposed route and report upon its advisability, and that said commissioner did report in favor of locating and establishing a public road from the main street of the village hereinbefore described extending west along the line between plaintiff's land and the railway strip above described a distance of fifty-four rods, thence south to connect with a road running east and west on the south side of the railway right of way. He further alleges that, after due service of notice by publication to interested parties, the board of supervisors accepted the dedication and established the proposed road as by consent. This road he alleges the defendants have obstructed by buildings and otherwise thus interfering with his free passage to and from his home and with the comfortable use and enjoyment of his property. The defendants answer jointly denying the allegations of the petition. In giving the case to the jury, the court withdrew from their consideration the matter of the alleged establishment of the road by the board of supervisors.

From this statement it is at once apparent that the question whether there is any evidence in the record to support a finding of the establishment of the alleged road by some act or agreement of dedication on the part of the railway company is of fundamental importance. A reading of the entire record convinces us that in this essential respect the plaintiff's case is fatally deficient. The only evidence presented which is claimed to show any express agreement to dedicate this road as a public way is to be found in an alleged conversation between plaintiff and one Gibson, division superintendent of the railroad at that point, which is said to have occurred about the year 1897. Plaintiff's own testimony on the subject is as follows:

I lived in and about Bouton in 1867, and up to the spring of 1901, when I moved to Perry. Was in a gen-

eral store business, grain, lumber, and tile business, and did considerable amount of shipping with the railway company and was personally acquainted with the officers of the company that visited that town. About the time when I was in business I had some conversation with Mr. Gibson, division superintendent of the Milwaukee Railway Company, in reference to the highway. When we first talked about this proposed road, we also contemplated building a lumber shed next the track, north of the side track and west of the highway going north and south. The railroad company, or Mr. Gibson, they objected to the shed going through at that place as it would cut them out of entering their ground west of that shed. They used the ground west of the shed for loading grain, and general purposes, and this shed, if built where we finally did build it, would cut them out from the use of that ground. To overcome that, I proposed to lay out this road going west so they could use it and get up to their grounds and the depot could use it. I can not give the exact words of Mr. Gibson's reply. He thought it would be all right. And on cross-examination he repeats: I do not know just the language, only I said we better establish a highway. I knew the company claimed to own that land. I do not think I asked Mr. Gibson to sign the petition. I showed the petition to the agent, but did not ask him to get Mr. Gibson to sign it. I do not remember the exact language of the conversation with Mr. Gibson, but the substance was, 'Well, we will establish a highway,' meaning the railroad company and us. I did not ask him, nor in any manner attempted to get him, to establish that highway, nor to sign any petition, nor take any steps toward it. I knew that Mr. Gibson would not sign any papers and would not do anything in the way of making a highway or giving any consent to highways, but when he knew it was going through, he offered no objections.

This is the sum total of the plaintiff's case so far as any alleged express agreement of consent on the part of the company is concerned. That plaintiff himself did not rely on this conversation as a sufficient dedication is shown by the fact that he soon followed it up by a petition to



the board of supervisors to establish a public road over the same route, but the establishment thus procured proved to be invalid for want of proper notice upon the parties. Turning to the proved circumstances from which it is sought by implication to show a dedication, they may be briefly stated as follows: About the time of the abortive attempt to secure the establishment of the road by the board of supervisors, plaintiff moved the fence which had stood on the south boundary of his premises, thirty feet to the north. A year later a road supervisor notified the company to put in a crossing at the point where the alleged road, after turning south, crossed the track. This notice was not complied with, but three or four years later, at the request of the road supervisor, and upon condition that he would prepare the approaches on either side, the company's roadmaster planked the crossing. For a long time prior to any suggestion being made for the establishment of a public way along this route, said way had been used by the public to a considerable extent. Neither before nor after the alleged dedication did the travel confine itself to any beaten track, but spread over the open grounds of the railway company, except as the lines converged at the place of crossing the track on the west and the opening north of the lumber sheds at the east end. Aside from such inferences as may be fairly drawn from this situation, we find nothing whatsoever to indicate any intention on the part of the railway company to dedicate a public highway. None of its acts are inconsistent with the theory of a permissive use or license to the public to pass over its unfenced grounds. At the very most the planking of the crossing is just as consistent with the theory of the company's willingness to accommodate the licensed travel, which the evidence shows was accustomed to diverge in that direction across the unplanked track, as with any intention to surrender the way to public control. Indeed, all the conduct of the railway company, even as revealed

by the plaintiff's own statements, tends strongly to show careful abstention on the part of its agents from any act or understanding which would bind it to a dedication of a public way.

Under our statute (Code, section 3004) the mere use of such way by the public, however long continued, can not be construed as adverse to the owner of the title. That a highway may be dedicated by parol, without deed or other written evidence thereof, is to be admitted; but it is a cardinal principle of the law on this subject that the intent to dedicate must clearly appear, and the acts and circumstances relied on to prove such intent must be unequivocal and convincing. *Morrison v. Marquardt*, 24 Iowa, 35; *Harris v. Commonwealth*, 20 Grat. (Va.) 833; *Graham v. Hartnett*, 10 Neb. 517 (7 N. W. 280); *McMannis v. Butler*, 51 Barb. (N. Y.) 436; *Jones v. Phillips*, 59 Ark. 35 (26 S. W. 386); *City v. Railroad Co.*, 152 Ill. 561 (38 N. E. 768); *Weiss v. Borough*, 136 Pa. 294 (20 Atl. 801). The evidence on the part of the plaintiff does not measure up to this standard. It follows of necessity that the claim of a statutory establishment of a road having been withdrawn from the jury by the trial court, and the showing made being in the judgment of this court insufficient to sustain a finding of dedication by the railway company, a new trial must be ordered.

There is very serious question whether, assuming the existence of the road as claimed by the plaintiff, he has suffered any such special damage from its alleged obstruction as entitles him to maintain an action for damages; but, in view of our conclusion upon the matter of dedication, we do not undertake its discussion. The result reached renders it unnecessary to rule on appellant's motion to strike the amended abstract.

For the reasons stated, the judgment appealed from is reversed.

EFFIE CALDWELL, Appellant, v. HERBERT CALDWELL.

**Divorce: INHUMAN TREATMENT: EVIDENCE.** The evidence in a divorce  
1 action is reviewed and held to justify a decree in favor of the  
wife on the ground of inhuman treatment, and that the wife was  
not guilty of conduct which would excuse the husband's treatment  
of her.

**Same: CUSTODY OF MINORS.** The mother is the natural custodian of  
2 children of tender years and upon divorce they will ordinarily  
be given to her, especially where she is not the offending party  
and it appears that she is able to furnish them a comfortable  
home, support and education.

*Appeal from Wapello District Court.*—HON. D. M.  
ANDERSON, Judge.

THURSDAY, FEBRUARY 11, 1909.

SUIT for divorce resulted in a decree as prayed and  
awarding the custody of a minor child one-half of the time  
to each party, alternating every six months. Both parties  
appeal; that of plaintiff being first perfected.—*Reversed*  
on plaintiff's appeal and *affirmed* on defendant's appeal.

*Steck, Daugherty & Steck*, for appellant.

*Cornell & Gillies*, for appellee.

LADD, J.—I. The parties hereto were married May  
21, 1898; she being eighteen and he twenty-nine  
years of age. Their only child, Willie, was born May  
5, 1902. The husband left for Arkansas with  
the assurance that he was done with her and  
would live with her no longer October 12,  
1906. She now makes her home with her mother and two

1. Divorce:  
inhuman  
treatment:  
evidence.

sisters in Ottumwa. He has a room and boards in Tucumcari, N. M. In the morning of the second day previous to his departure, he knocked his wife down with his fist, jammed her head against the refrigerator, choked her, and in violence undertook to drag her from the room, and when she screamed his only response was that if she did so again he would choke the life out of her. She sent the little boy for help twice, but none came. He finally desisted, but not until nearly tearing her clothes from her person. She was so frightened and nervous as not to recover for several weeks, and all this was over getting Willie's shoes from the next house, where they had been left the night before. True, defendant attempted to belittle this affair by denying that he struck or choked her, but he did admit that he took her by the arms and pushed her, that she was on the floor, and that her clothes were badly torn. The fingermarks on her neck and bruises on her person, as well as his statement to her mother in presence of a sister that he had knocked her down and the wonder was he did not do worse, amply corroborated and confirmed her story. Added to this should be her testimony that he had laid violent hands on her several times before, was in the habit of cursing her, and, against her entreaties, had absented himself four weeks before and until three weeks after the birth of the child. Again he denied having struck her and explained that he was absent earning money at the time of her confinement with her consent.

Enough has been said to indicate that the finding of the trial court that defendant has been guilty of treatment so cruel and inhuman and involving such danger to plaintiff's life as to justify the decree of divorce is supported by the record, unless he shall be excused because of provocation by her. It appears that about a year and a half prior to the separation they attended an entertainment given by the trainmen, where she undertook to dance a

quadrille. She had never danced before and when with him at another like entertainment sought his consent to learn. It was given with the understanding, that, when able to dance, she might attend. She learned, and, as her husband was away on the road as brakeman most of the time she accompanied Dr. and Mrs. Miller, Mr. and Mrs. Kaufman, or Mrs. Minton to and from the several dances. The propriety of her conduct is not questioned, save that she went too often. Possibly she attended more frequently than was wise, sometimes oftener than once a week, and undoubtedly her husband remonstrated with her toward the last. He testified that she attended Pellister's dance the night before the trouble in spite of his protests and assertions that he would not live with her if she went; she, that he gave his consent on her statement that she would not go thereafter. It is not to be overlooked that he was not objecting to her dancing nor to her attendance of dances in his absence, but merely insisting that she was going too frequently. Surely this did not justify him in beating his wife and threatening her life over a trivial dispute concerning their baby's shoes, especially in view of his emphatic denial of any suspicion of undue intimacy on her part with other men and of which no ground appears in the record. The decree granting the divorce has the approval of this court.

II. Custody of the child was given the mother for six months after the date of the decree, and then to the father six months, and provision made for alternating every six months. She was not to remove him from the State, but no such restriction was imposed on the defendant. Should he remove the child to New Mexico the court would be without power to enforce his return to the mother. Were the little boy to be regarded as a mere plaything existing alone for the pleasure and entertainment of his parents, there might be some justification in changing his place of resi-

2. SAME: custody  
of minors.

dence twice a year; but, as his welfare is of paramount importance, he should be accorded, if possible, such a home as will conduce to his physical and moral well-being and enable him to acquire a suitable education. No argument is required to support the proposition that a permanent abode is for a child's best interest and rarely, indeed, will a divided custody by parents who have separated prove beneficial. Nature has devolved upon the mother the care and nurture of her children in tender years, and during that time, save in exceptional circumstances, she is best fitted and most inclined to look after their welfare. Moreover, courts are inclined to award the custody of children to the innocent party on the theory that better treatment may be anticipated from a person who has observed the marriage vows than from him who has violated them. *Cole v. Cole*, 23 Iowa, 433. Certainly the circumstances of this case are not such as to call for unusual provisions in the decree. The child was under five years of age at the time of the hearing and with his mother was sharing the home of his grandmother and two aunts who regarded him with affection. His mother was earning \$12 to \$15 per week as tailoress, and, with the aid of \$10 per month which the decree required defendant to pay for the child's maintenance, will be able to suitably care for and keep him. The record is silent as to any facilities for his proper care by defendant. In these circumstances the custody of the child should have been awarded to plaintiff. As supporting this conclusion, see *Aitchison v. Aitchison*, 99 Iowa, 98; *Smith v. Smith*, 15 Wash. 237 (46 Pac. 234); *Sinclair v. Sinclair*, 91 App. Div. 322 (86 N. Y. Supp. 539); 14 Cyc. 807.

The decree will be modified accordingly.

*Reversed* on plaintiff's appeal. *Affirmed* on defendant's appeal.

STATE OF IOWA, EX REL. GEORGE PRATT, Relator, v. THE  
SECRETARY OF STATE OF IOWA, W. C. HAYWARD as  
Secretary of State, Defendant and Appellant.

**Elections: REFUSAL TO CERTIFY NOMINATION: REMEDY.** The courts have

- 1 no jurisdiction of questions relating to the validity of certificates or nomination papers of candidates for state office; the statutes create a tribunal consisting of the Secretary of State, Auditor of State and Attorney General whose determination of such questions is final, and where a candidate is aggrieved with the action of the Secretary of State in refusing to accept his nomination papers as valid, his remedy is to file his objection thereto as provided by statute and thus secure a hearing before that tribunal; and where no objection to the action of the Secretary of State in refusing to file nomination papers is made his action becomes final.

**Primary nominations: AUTHORITY OF PARTY COMMITTEE.** The primary

- 2 law for the nomination of candidates by direct vote is mandatory, and in the first instance all nominations required to be made must be made in that manner; it is only where there has been a regular nomination by direct vote and for some reason a vacancy has occurred that a party committee may act in the premises.

*Appeal from Polk District Court.*—HON. HUGH H.  
BRENNAN, Judge.

THURSDAY, FEBRUARY 11, 1909.

THE opinion states the case.—*Reversed.*

H. W. Byers, Attorney General, and George Cosson,  
Assistant Attorney General, for appellant.

Frank B. Wilson and Geo. A. Wilson, for appellee.

SHERWIN, J.—This is an action of mandamus brought

by George M. Pratt to compel the Secretary of State to certify to the auditors of Adair and Madison Counties his name as the Democratic candidate for senator of the Sixteenth senatorial district of Iowa. The relator obtained a judgment as prayed, and the defendant appeals.

At the June, 1908, primary election, there were four ballots cast for Democratic candidates for the office of senator of the Sixteenth senatorial district of Iowa. Four candidates for the office were voted for. Hence each candidate received but one vote. Abstract returns were duly made to the Secretary of State, and the vote from that senatorial district was canvassed as provided by law. A certificate as to the office of senator was prepared as required by section 1087a22, Code Supp. 1907, and there is evidence in the record tending to show that it was sent to the Chairman of the Democratic central committee for that district and to the auditors of the counties of Adair and Madison; but there is evidence supporting the claim that it was not received by any of the parties named, and, as we understand the record, the trial court so found. No district convention was called or held pursuant to the provisions of section 1087a26, Code Supp. 1907. On the 2d day of October, 1908, the central committee of the senatorial district met and nominated the relator, George M. Pratt, as the Democratic candidate for the office of senator. A certificate of such nomination was tendered for filing at the office of the Secretary of State on the 3d day of October, 1908, but it was rejected, and no certificate was issued by the Secretary thereon.

The first legal proposition presented by the appellant for our determination is that the district court was without jurisdiction to hear and determine the question presented to it. We think this contention must be sustained. Section 1087a1, Code Supp. 1907, provides, among other things, that "the provisions of chapters three and four, title six, . . .

1. ELECTIONS:  
refusal to cer-  
tify nomina-  
tions: remedy.



of the Code shall apply so far as applicable to all such primary elections, the same as general elections, except as hereinafter provided." Section 1103 of the Code is in part as follows: "All objections or other questions arising in relation to certificates of nomination or nomination papers shall be filed with the officer with whom the certificate of nomination or nomination papers to which objection is made are filed. Those with the Secretary of State shall be filed not less than twenty days, and those with other officers not less than eight days, before the day of election, except that nominations to fill vacancies occurring after said time, or in case of nomination made to be voted on at a special election, objections shall be filed within three days after the filing of the certificate or nomination papers. Objections filed with the Secretary of State shall be considered by the Secretary and Auditor of State and Attorney General, and a majority decision shall be final." It says that "all objections or other questions arising in relation to certificates of nomination or nomination papers" shall be filed as therein directed, and that "objections filed with the Secretary of State shall be considered by the Secretary and Auditor of State and Attorney General, and a majority decision shall be final."

The section clearly creates a tribunal for the determination of all questions arising in relation to certificates of nomination or nomination papers, and makes the decision of such tribunal final. In the instant case the question before the Secretary of State related to the validity of the certificate or nomination papers of the relator; and, if he considered the action of the Secretary in refusing to accept as valid and file such nomination papers, he should have filed objections to said action, and thereby secured a hearing before the tribunal created for the purpose.

The purpose of the statute is to afford a prompt review of all questions concerning the validity of certificates of nomination or nomination papers; and the provision

making the decision final was undoubtedly intended to avoid delay and the complications sometimes incident to general judicial proceedings. In his discussion of this statute the appellee overlooks its broad language, and is mistaken when he says that the tribunal created thereby can only act when written objections are filed to nomination papers already filed. Under the construction contended for, no objections could be filed or any questions raised until after filing, no matter how incomplete or insufficient the papers offered might be. In other words, the Secretary would be compelled under the appellee's construction to file everything offered, and such a result was clearly not contemplated by the lawmakers. The Secretary evidently refused to file the appellee's papers upon the ground that no legal nomination had been made. This action might have been questioned or objected to by the appellee in the manner pointed out by the statute, and, he having failed to take such action, the Secretary's action must be held final.

There is no authority in the statute for the nomination made by the district central committee in this case, and the Secretary of State rightly refused to recognize and file the certificate. Section 1087a1 of the Code Supplement of 1907, among other things, provides: "That from and after the passage of this act, the candidates of political parties for all offices which under the law are filed by the direct vote of the voters of this State at the general election in November (except candidates for the office of judge of the Supreme, district and superior courts) . . . shall be nominated by a primary election and delegates to the county conventions of said political parties or organizations and party county committeemen shall be elected at said primary election, at the times and in the manner hereinafter provided." The first requirement of the primary law is that the candidates of political parties

2. PRIMARY NOM-  
INATIONS:  
authority of  
party  
committee.

for all offices which under the law are filled by the direct vote of the voters of this State at the general election in November shall be nominated by a primary election. This requirement is mandatory, and the method of nomination provided for in the primary statute is exclusive. It follows that the provisions of chapters 3 and 4, title 6, Code, so far as they provided methods of nomination inconsistent with the provisions of the primary enactment, were by that enactment repealed by implication. If this be true, the district central committee had no authority under section 1102 of the Code to nominate the relator for the office of senator for the reason that section 1087a24, in so far as it relates to the matter under consideration, is a substantial re-enactment of the provisions of section 1102 of the Code, and furnishes the only authority in the matter: Section 1087a24 provides that "vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate or from any other cause, shall be filled by the party committee for the county, district or State, as the case may be, representing the party in which the vacancy nomination occurs." In our judgment the authority of any party committee is therein limited to cases where nominations have been previously made at the primary, and vacancies have thereafter occurred. This section does not authorize a party committee to make a nomination in the first instance. It is only given power to nominate when the nominee of the primary election is no longer a candidate, and because of such fact a vacancy occurs. *Healey v. Wipf, Secretary* (S. D.) 117 N. W. 521. And no other or greater power was conferred by section 1102 of the Code, and, were we to be governed by that section in this case, we should be compelled to hold the central committee without the power assumed by it. Section 1087a26 provides for nominations by convention when there has been a failure for any reason to nominate a senator at the pri-

mary election. This course was open to the interested parties herein, and they had no right or authority to proceed as they did.

The judgment of the district court must be, and it is, *reversed*.

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A. PUMPHREY, Plaintiff, v. D. M. ANDERSON, Judge.

**Intoxicating liquors: MULCT SALOONS: REGULATIONS: LIST OF EMPLOYES.**

The statute requiring those operating a mulct saloon to file with the county auditor a list of all persons employed about the place of business includes not only regular barkeepers but all other persons in whatever capacity employed.

*Certiorari to Wapello District Court.*

FRIDAY, FEBRUARY 12, 1909.

THIS is an original action instituted in this court for the purpose of having determined the legality of the order of defendant, as district judge, refusing to hold one James Beaty guilty of contempt of court on an information filed by this plaintiff as relator, charging said Beaty with violating an injunction and decree of the district court of Wapello county, restraining him from keeping, storing and selling intoxicating liquors in violation of law on certain premises in Ottumwa by unlawfully keeping and selling intoxicating liquors.—Order *annulled*.

*E. R. Acres* and *M. S. Odel*, for plaintiff.

*Smith & Lewis*, for defendant.

McCLAIN, J.—The injunction which James Beaty, defendant in the contempt proceedings, was charged with violating, restrained him from keeping and selling intoxi-

cating liquors in violation of law in Ottumwa, in which city the mulct law was in force, and said Beaty was authorized to sell so long as he complied with the provisions of said mulct law. The sole question in the contempt proceedings was whether said Beaty had, in the method of conducting his place of business, so violated the provisions of the mulct law as to forfeit his right to continue said business. The violation relied upon as constituting a forfeiture of the right to continue the business, so that subsequent sales were contrary to the terms of the injunction decree, consisted in failure to file with the county auditor a list of names of all persons employed about the place, and permitting persons behind the bar whose names were not thus listed with the county auditor. See Code, section 2448, par. 4. It appeared from Beaty's own testimony in the contempt proceedings that he employed porters and other workmen temporarily, from time to time, to clean up his place of business during business hours and wash up the bottles and glasses back of the bar, that these persons did go behind the bar in this employment, and that their names were not listed with the county auditor, but that these persons were not authorized to, and did not, sell or handle liquor behind the bar or otherwise. We think that the provision of the statute with regard to having employees about the place who are allowed to go behind the bar, and whose names are not listed with the county auditor, extends, not only to the regular barkeepers, but to any persons employed about the place for any purpose. The object of the statute evidently is to prevent the employment of persons about the place, and especially behind the bar, who may be in situation to handle liquor, whether they do so with or without authority. In other words, the authority which may be given to such employee by the person conducting the place is not the test for determining whether their names should be listed with the county auditor. The act of Beaty in having about his place em-

ployees whose names were not listed as required by the statute was, in our judgment, a violation of the statute, and therefore a violation of the injunction which had been issued restraining Beaty from unlawfully conducting his business, and the trial court should have punished him for contempt.

The action of the defendant in refusing to adjudge Beaty guilty of contempt was unauthorized, and is therefore *annulled*.

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D. T. SOLLENBARGER, Administrator of the Estate of  
VIOLA HERRON, Deceased, v. THE INCORPORATED  
TOWN OF LINEVILLE, IOWA, Appellant.

**Municipal corporations: SIDEWALK ACCIDENT: NOTICE: DESCRIPTION**

1 OF PLACE. The notice to be served upon a city specifying the time, place and circumstances of a sidewalk accident, to preserve a right of action therefor for more than sixty days, must be wholly in writing and must describe the place with sufficient definiteness to enable a person of ordinary capacity and with knowledge of the physical conditions of the street, when in the exercise of reasonable diligence, to locate the place of injury from the description contained in the notice.

**Same.** The description in the notice cannot be aided by oral proof

2 that the municipal authorities were verbally advised of the precise place of accident.

**Same.** Where an accident occurs because of a loose board, proof

3 that there was but a single board loose in the walk on the street designated in the notice might within reasonable limits be good, but where the only reference to the place of accident was a certain street three-fourths of a mile long the notice was insufficient, for the authorities are not required to search the entire street.

**Same: SUFFICIENCY OF NOTICE: HOW DETERMINED.** Where the place of

4 accident described in a notice, given the municipality is wholly indefinite and uncertain, and there is no extrinsic evidence in aid of the notice, its sufficiency is a question of law.

*Appeal from Wayne District Court.*—HON. H. M. TOWNER, Judge.

FRIDAY, FEBRUARY 12, 1909.

ACTION for damages resulted in a judgment. Thereafter plaintiff died, and the administrator of her estate was substituted as party plaintiff. The defendant appeals.—*Reversed.*

*Tedford & Carter*, for appellant.

*Poston & Murrow*, for appellee.

LADD, J.—Viola Herron resided on the south side of West Third Street in the defendant town, and in the first house east of Jones Street. She had put in a garden on a lot on the north side of the street, and at two or three o'clock in the afternoon of June 8, 1906, started with an armful of pea sticks from her back yard to go across to the garden. Upon reaching the walk on the south side of the street she stepped on it, a loose board flew up, tripping her, and she fell. To her claim for damages the defendant interposes but two objections on this appeal: (1) That the action is barred by the statute of limitations; and (2) that she was guilty of negligence contributing to her injury. Only the first part of these need be considered. The action was not begun until October 18, 1906, more than three months subsequent to the injury, so that, "unless written notice specifying the time, place and circumstances of the injury shall have been served upon" the town "within sixty days from the happening of the injury," the action is barred. A paper in words following was delivered to the mayor and members of council in session on July 11, 1906.

Lineville, Iowa, July 11, 1906.

Town of Lineville, Iowa, to Mrs. Joseph Herron, Dr.	
To damages resulting from injuries received from falling on defective sidewalk, on West Third Street, Lineville, Iowa, June 8, 1906.....	\$158.00
More particularly itemized as follows:	
To 24 days' time during which she was absolutely unable to perform any labor, or her usual voca- tion . . . . .	\$ 24.00
To doctor's bill for treatment and medicine....	10.00
To damages for suffering and pain as result of injuries . . . . .	100.00
To 8 weeks' time at one-half pay.....	24.00
<hr/>	
Total . . . . .	\$158.00

The sufficiency of this notice is challenged on three grounds: (1) It was not signed; (2) it does not sufficiently describe the place where the injury occurred; and

(3) it fails to state the circumstances of the injury. The first objection, omission of signature, is disposed of by *Neely v. Mapleton*, 139 Iowa, 582. The place is described

in the notice as "on West Third Street, Lineville, Iowa." This street was three-fourths of a mile in length. Manifestly the notice alone was altogether too general to indicate the place of the accident. Courts have repeatedly declared that no more than reasonable certainty is required, but that much ought not to be dispensed with. To exact less would defeat the very purpose of the statute in many cases and in all annul the requirement that the notice be in writing. Though its object is to apprise the authorities of the location of the defect in the street, and of the time and circumstances of the injury, to the end that they may investigate while the facts are fresh, nevertheless it is a condition essential to avoid the bar of the statute, and to

1. MUNICIPAL  
CORPORATIONS:  
sidewalk acci-  
dent: notice:  
description  
of place.



be effective must be in writing. *Giles v. City of Shenandoah*, 111 Iowa, 83; *Sachs v. Sioux City*, 109 Iowa, 224. Undoubtedly the description of the place as contained in the notice may be aided by proof of conditions as they exist, but the better-considered cases are to the effect that the notice must be sufficiently definite in itself to enable a person of ordinary capacity, with knowledge of the physical condition of the streets, in the exercise of reasonable diligence, to locate the place of the injury. Thus in *Barribeau v. City of Detroit*, 147 Mich. 119 (110 N. W. 512) the court held that "to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice. . . ." This rule permits a construction of the statute provision which does not emasculate it, and one which is in accord with the opinions of the courts. In New Hampshire the rule is thus stated: "If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can by the exercise of reasonable diligence and without other information from the plaintiff find the exact place where it is claimed the damage was received, it is in this respect sufficient, because it fully answers the purpose of the statute," and whether this may be done is ordinarily a question for the court. *Carr v. Ashland*, 62 N. H. 665.

In *Maloney v. Cook*, 21 R. I. 471 (44 Atl. 692) the place was described as "the southerly side of Church Street" in Woonsocket. The street was a quarter of a mile long, and the notice was adjudged insufficient, even though it appeared that within the sixty days within which the notice was required to be served plaintiff's counsel explained to the committee on claims particularly the place where the accident happened, and the city was fully informed thereof, the court saying that: "If the defect in the notice required by that statute could be cured in this

way, we agree that under the evidence it would now be sufficient. But as the giving of the notice provided for is a condition precedent to the beginning of the action, for the court to say that it can be amended in this way would be to render the statute of no avail. We feel compelled to hold, therefore, that the notice was insufficient." In *Shea v. Howell*, 132 Mass. 187, the notice that the injury was caused by a defect in a named street was held insufficient, the court saying: "It would violate the provisions, and defeat the purposes of the statute, if the plaintiff were permitted to supply the deficiencies of the written notice by proof that the city or its officers had oral information from her, or from any other source, of the time, place and cause of her injury, and the court rightly rejected the evidence offered by her for the purpose. The notice can not be partly written and partly oral. It must be wholly in writing, and its sufficiency is to be determined by the court." To the same effect see *Sowle v. City of Tomah*, 81 Wis. 353 (51 N. W. 572); *Trost v. City of Casselton*, 8 N. D. 534 (79 N. W. 1071), and *Underhill v. Town of Washington*, 46 Vt. 771, where it is said: "The statute is mandatory in form, and declares that no action shall hereafter be maintained in any court of this State unless this preliminary act shall be done within the time specified. The place where the injury occurred is a cardinal and special requirement of the statute; and, if this requirement can be supplied by parol evidence, then may the statute be annulled and utterly disregarded. We think parol evidence not admissible to supply a legal requirement of a written notice." The statutes exacting notice differ somewhat from ours in some States, in that the notice is a condition precedent to the maintenance of the action, but the purpose is not different from that in statutes like that of this State.

The cases relied on by appellee, save one, do not support the contention that the notice may be aided by oral

evidence that the municipal authorities were advised orally of the place where the accident happened.

2. SAME.

In *Lincoln v. O'Brien*, 56 Neb. 761 (77 N. W. 76) the notice described the place where complainant stepped into a hole as on the north side of Q. Street between Eighteenth and Twentieth Streets, and as the only holes in the walk were in front of a vacant lot between Eighteenth and Nineteenth Streets, the court held the notice sufficient, saying that "in examining the rather numerous cases on the subject certain principles will be found to run through all. One is that it is sufficient, as above stated, if the place be so described that from that description it can be identified with reasonable diligence. Another is that the sufficiency of the notice is not to be determined from its terms alone, but in the light of extraneous evidence of the situation and surroundings." A like decision is *Connor v. Salt Lake City*, 28 Utah, 248 (78 Pac. 479). Some reliance is placed on *Owen v. City of Ft. Dodge*, 98 Iowa, 281, where extrinsic evidence was received, not to supplement the notice, but to show that the city was not misled by it. As there said, it need not point out the exact spot, but if, notwithstanding inaccuracies, it contains the necessary information to enable the officers of the city to locate the place, it is good, and that they did find it is mentioned merely as a fact confirming the sufficiency of the notice. In *Rusch v. City of Dubuque*, 116 Iowa, 402, evidence that defendants investigated the very walks described in the notice was held sufficient to obviate any prejudice from failure "to locate the place within the few feet mentioned." In *Buchmeier v. City of Davenport*, 138 Iowa, 623, the place was described "as a crossing at Ninth and Warren Streets," and as it did not appear that there was more than one crossing at the intersection of these streets, it was held that the trial court erred in directing the jury that the notice was insufficient. The description was adjudged sufficient if, when applied

to existing conditions as proven on the trial, it would enable the officers to locate the place of the accident. The possible exception referred to is *Cook v. Topeka*, 75 Kan. 534 (90 Pac. 244), where description of one place was allowed to be supplemented by oral evidence that the officers ascertained, on investigation in pursuance of the notice, that the accident happened at another, whether sound, is not involved in this case.

Appellee argues that as only one loose plank in the walk on either side of the street was proven, this with the notice was sufficient to identify the place. Within rea-

sonable limits the argument may be good,  
 3. SAME. as when the side of the street is given and the place is within a block or two, as in *City of Lincoln v. O'Brien*, *supra*, and *Connor v. Salt Lake City*, *supra*, but the municipal officers are not bound to look up one side and down the other of a street three-fourths of a mile long to ascertain whether there is more than one point where a plank may be loose in order to ascertain the possible place intended by a defective notice. The mere statement indicates that a notice requiring this is not reasonably certain.

It is urged, however, that the issue was for the jury, and this is sometimes so when the notice, in connection with proof of the situation, and surroundings of the locality in connection with the description,

4. SAME: sufficiency of notice: how determined. raises an issue as to whether the place is pointed out with reasonable certainty; thus where the language of the notice is of doubtful meaning, and honest minds might differ concerning it (*Carr v. Ashland*, 62 N. H. 665), or where the notice does not purport to accurately locate the place, but generally, as between two near points, *City of Lincoln v. O'Brien*, 56 Neb. 761 (77 N. W. 76), or on a bridge of considerable length (*Lyman v. Hampshire County*, 138 Mass. 74). In cases of this kind, and perhaps others, it may be proper to per-

mit the jury under suitable instructions to say whether the notice given when aided by inquiries suggested therein was sufficient to enable the city authorities, acting with reasonable diligence, to locate the place. The extrinsic evidence relating to the street in the case at bar left the notice entirely indefinite and uncertain as to locality, so that there was no issue to be submitted. It went to the jury on the theory that if the paper in connection with the oral explanation of plaintiff's agent, made to the counsel of the defendant when the paper was presented, pointed out the place with reasonable certainty, this would be sufficient compliance with the provisions of the law. This was tantamount to saying the notice might be partly oral and partly in writing, notwithstanding the requirement of the statute that it be in writing.

Because of there being no sufficient notice, the cause of action was barred by the statute of limitations, and a verdict for defendant should have been directed.—*Reversed.*

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R. E. DOIGE, Appellee, v. JACK BRUCE, Appellant.

**Real property:** RECOVERY OF POSSESSION: EQUITABLE ACTION. Where

- 1 one is in possession of leased premises claiming the right thereto by virtue of having purchased the rough feed on the place, and, by assignment of the lease, the rightfulness of his possession cannot be determined in an equitable action, as there is a plain, speedy and adequate remedy at law.

**Same:** LANDLORD AND TENANT. Where a landlord was present at a sale

- 2 by the tenant of growing corn and pasturage and knew of an assignment of the lease to the purchaser and of his possession thereunder, thus impliedly if not expressly assenting thereto, and it did not appear that the assignee was committing any waste, the landlord cannot adjudicate the purchaser's right of possession in a court of equity.

*Appeal from Dallas District Court.*—HON. J. H.  
APPLEGATE, Judge.

FRIDAY, FEBRUARY 12, 1909.

SUIT in equity to enjoin defendant from trespassing upon, or in any way interfering with, plaintiff's possession of certain real estate in Dallas County, Iowa. The trial court granted the relief prayed, and defendant appeals.—*Reversed.*

*Fred G. Clarke* and *W. H. Fahey*, for appellant.

*Shortley & Kelley*, for appellee.

DEEMER, J.—It is conceded that plaintiff is the owner of the property involved in this suit, and that he leased the same to Howard Bros. by written lease, which expired March 1, 1907. It was provided in the lease that the lessee should not sell, assign, underlet, or relinquish the premises without the written consent of the lessor. On July 2, 1906, Howard Bros. assigned the lease to one F. H. McCormick, and on September 29, 1906, McCormick in turn assigned the same to one R. D. Howard. Plaintiff impliedly, if not expressly, consented to the lease to McCormick, but, save as hereinafter stated, he did not consent to the assignment to Howard. McCormick occupied the farm, and brought certain property thereon, which latter he concluded to sell, and accordingly announced a public sale for September 18, 1906, which was before the assignment of the lease to Howard. Sale was had on the day indicated, and part of the property sold consisted of about ten and one-half acres of growing corn which was purchased by defendant, Bruce. It is claimed that the auctioneer announced, at the time of the sale, that the successful bidder was to have what was called "the roughness" and the adjoining pasturage, which laid on that side of the highway. Thereafter the defendant procured an assignment of the lease from Howard, but this was without

the plaintiff's consent. After defendant's purchase he took possession of the entire field where the corn was standing, turned his stock therein, and was using the same when this action was commenced. Plaintiff's rent was paid until March 1, 1907—the final payment having been made by McCormick—but he commenced this suit on December 18, 1906. He alleged that defendant, without right or authority, was pasturing his land, and that he refused to take his cattle therefrom, and he also alleged that the cattle were injuring and destroying his hay and pasture land. He further averred that he was in possession of the premises and that defendant had trespassed thereon, and was threatening a continuance thereof, without any right or authority, and that his land was being damaged by plaintiff's stock. Defendant claimed that he purchased the corn and the "roughness" at the public sale on the strength of the statement that he would have the right to pasture the same; that he was in possession of the property with the knowledge and consent of plaintiff, was committing no waste, and that plaintiff's remedy, if he had any, was an action at law. The trial court on the issues joined enjoined defendant from pasturing the premises, or any part thereof, or from interfering, by himself or others, with plaintiff in the free use of the premises. The appeal challenges this decree upon two grounds; First, it is insisted that, as defendant was in possession when the action was commenced, injunction is not the proper remedy for plaintiff to take in order to regain the possession, for the reason that he had a plain, speedy and adequate remedy at law, either to recover the possession by an action of right, or by the summary remedy of forcible entry and detainer; second, he contends that, by reason of the representations made when he purchased the land, plaintiff is estopped from saying that he was not in the rightful possession of the land.

As plaintiff does not recognize defendant as his ten-

ant, this is clearly not an action to prevent waste, and it can only be sustained upon the theory that defendant is upon the land without right, and was and is a trespasser. Of course an injunction will lie upon the part of a landlord to prevent waste, the erection of a nuisance by the tenant, bad husbandry, and other like cases. Taylor, Landlord and Tenant, sections 691, 208, 418, 422, 685. Injunction, however, is not, as a rule, a possessory remedy, although it will lie to prevent a trespass, or a series of trespasses. But a bill in equity is not the appropriate remedy to gain the possession of property. Jones on Landlord and Tenant, section 565, and cases cited. At the time the suit was commenced defendant was in possession, claiming the right thereto in virtue of his purchase of the corn and "roughness" at the public sale, and in virtue of his assignment of the lease; and the rightfulness of that possession could not be determined, and a change thereof decreed in a court of equity, for the reason that plaintiff had a plain, speedy and adequate remedy at law. Defendant's possession was under claim of right, and an action by injunction is not a proper method whereby to secure an eviction. See cases cited in 22 Cyc. 826, 828, 829. *Wearin v. Munson*, 62 Iowa, 466; *Currier v. Jones*, 121 Iowa, 160; *Johnson v. Lehigh Valley Co.* (C. C.) 130 Fed. 932.

The trial court seemed to think that the land had been abandoned by the tenants under the lease or their assignees, and found that defendants were trespassers, but this conclusion does not seem to have foundation in the record. Defendant was, from time of the purchase of the corn down to the bringing of this suit, in possession of a part of the property, not only because of his purchase, but by reason of his assignment of the lease, and Howard was in possession of the remainder of the land under an assignment

1. REAL PROPERTY: recovery of possession: equitable action.

2. SAME: landlord and tenant.



of the lease therefor to him. Of course there may be cases of irreparable injury from a trespass, where courts of equity will intervene by injunction to prevent the commission or continuance thereof, but this is not one of them. Plaintiff had received his rent for the premises. He knew of the sale of corn, and the roughness to the defendant, and knew that defendant would have to go upon the land to enjoy the fruits of his purchase. He knew that defendant had turned his cattle upon the land for the purpose of getting the benefit of his bargain. He also knew that Howard was in possession under an assignment of the lease to him, and that Howard had assigned the lease to the defendant, who was in possession when this suit was commenced. The effect of the decree was to transfer the possession from defendant to plaintiff. Indeed the decree prohibits defendant from using, occupying, or pasturing the property, and from interfering with plaintiff in the free use of the same. It does not appear that defendant was using or treating the property in any other or different manner than if he had been the purchaser of standing corn upon leased premises; but, if he were, he received, and was granted, the right to do so through the auctioneer who conducted the sale of the property. Whilst this auctioneer was not, perhaps, plaintiff's agent, he (plaintiff) was present when the statement was made, and interposed no objection thereto. The action is not to prevent waste, but to secure and preserve to plaintiff the possession of the property. To such an action it is sufficient to say that defendant is in possession under a claim of right, and that plaintiff has not the possession of the property. Courts of equity will not in such cases attempt to adjudicate the title or right of possession. See cases cited in 22 Cyc. 826, 827.

The trial court was in error in granting the relief asked, and its decree must be, and it is, *reversed*.

EVA R. BROWN v. ALMON EDWIN NORTH, BESSIE NORTH, his wife, FREDERICK EUGENE NORTH, GUSTAVUS ADOLPHUS NORTH, MINNIE GRACE NORTH, JACOB ASTOR NORTH and LLOYD NORTH, Appellants.

**Deeds: DELIVERY: EVIDENCE: DOWER.** The delivery of a deed is largely  
1 a question of intent to be gathered from all the facts and circumstances. On an issue as to delivery of a deed executed by grantor prior to his marriage, the evidence is reviewed and held insufficient to show delivery until after his marriage, and that his widow was therefore entitled to her dower interest in the land so conveyed.

**Partition: TERMS OF SALE: REVIEW OF ORDER.** An order in partition  
2 appointing referees and directing a sale for cash if it can be made, if not, then partly for cash with balance on time secured by a mortgage back on the land, will not be disturbed on appeal; especially where the matter is still in the control of the district court who may make such further order as the interests of the parties may require.

*Appeal from Guthrie District Court.*—HON. J. H.  
APPLEGATE, Judge.

MONDAY, FEBRUARY 15, 1909.

THIS is a suit in equity for the partition of real estate, the plaintiff claiming as the widow of Thos. J. Brown, deceased. There was a decree for the plaintiff, from which the defendants appeal.—*Affirmed.*

*Hinkson & Nies* and *J. W. Morris*, for appellants.

*E. R. Sayles* and *J. R. Mount*, for appellee.

SHERWIN, J.—Thomas J. Brown died in February,

1907. He was the owner of the land involved in this controversy until some time in the early part of September, 1905, at which time he conveyed it to the defendants herein by a deed, which was duly executed and recorded in Guthrie County. The plaintiff bases this action for partition upon the ground that she was the legal wife of Thos. J. Brown at the time of the conveyance in question, and that she did not join in the deed conveying the land. If this claim be sustained, she was and is entitled, as the widow of Thos. J. Brown, to an undivided one-third interest in said land. The plaintiff claims that she entered into a marriage contract, which was not ceremonial, with Thos. J. Brown, on the 23d of October, 1900, and that thereafter, until the time of his death in 1907, they lived and cohabited together as husband and wife, and that such marriage agreement, followed by cohabitation, constituted a common-law marriage, and that because of such marriage she is entitled to claim an interest in said land as his widow. She further pleads that on the 31st day of October, 1905, a ceremonial marriage between her and Thos. J. Brown was solemnized, and that at the time of said second marriage Thos. J. Brown was the owner of the real estate in question; he having at that time never executed a completed conveyance thereof. The trial court found that there had been no delivery of the deed in question, nor any intention to deliver the same prior to the ceremonial marriage to which we have referred, and that the plaintiff was entitled to a one-third interest in the land in question, and a partition thereof was ordered by a sale of the premises. The appellants have appealed from this finding of the trial court. The trial court further found against the plaintiff's claim that there had been a common-law marriage in 1900, and from this finding the plaintiff appeals.

We shall first discuss the question of the delivery of the deed. As we understand the record, the defendants

are grandchildren of the deceased, Thos. J. Brown, and at the time of the execution and delivery of the deed in question they were all residents of Kansas. The deed was signed and acknowledged on the 27th day of June, 1905, and remained in the physical possession of the grantor, Thos. J. Brown, until the 2d day of September, 1905, when it was delivered to the proper officers of the county to be recorded. It was entered by the auditor of the county for taxation on the same day, and thereafter, on the same day, it was duly filed for record in the recorder's office and recorded. After it had been recorded it was taken from that office by the grantor, Thos. J. Brown, and he kept it in his possession until the 8th of September, 1905, at which time he inclosed it with a letter to some of the grantees, the defendants herein. A recitation of the above facts concerning the making, recording and delivery of the deed would, in themselves alone be sufficient to sustain the plaintiff's claim that there had in fact been no delivery of the deed prior to the ceremonial marriage, on the 31st of August, 1905; but, to overcome the force of these circumstances, the appellants rely upon certain letters, which the record shows were written to some of them by the deceased during the summer and fall of 1905, and prior to the 31st day of August, and upon a letter claimed to have been written by him, but lost after its receipt, and further upon a transaction between one of the defendants herein, Almon Edwin North, and the deceased, alleged to have taken place some time about the 25th of August, 1905, from which the conclusion is sought to be established that the deed in question was then delivered to Almon Edwin North for himself and his co-grantees.

It would be impossible, within the proper limits of this opinion, to set out the material portions of the correspondence relied upon, or to give extended portions of the evidence which it was claimed supported the contention of

delivery prior to the 2d of September, 1905, and hence we shall state only our conclusions from a careful reading and consideration of all the testimony in the case. While some of the letters from Thos. J. Brown to some of these defendants, or to their parents, clearly indicate an intention on his part to make them a gift of some of the land in the future, there is not in the whole correspondence a word from which an inference may be drawn that he intended to make a present gift. His letters all refer to action that he may take in the future and do not signify that the gift will be made, if made at all, at any particular time. The transaction and the conversation claimed to have taken place between Almon Edwin North and the deceased in August, 1905, even if considered as proven by competent testimony, fall far short of sustaining the appellant's claim of a delivery of the deed at that time, or of showing an intention to make a delivery at that time. On the contrary, there is much in the transaction as related, when it is considered in connection with the grantor's subsequent acts and the letter written by him to the appellants which accompanied the deed, showing a clear intent on the grantor's part, not to make an immediate delivery of the deed. That Almon E. North understood that the deed was not delivered to him in August when he was at his grandfather's in Guthrie County is indicated by his letter to his grandfather acknowledging the receipt of the deed. Moreover, there is undisputed evidence in the record that after the visit of said North in August, 1905, Brown leased the land to a third party, and in all respects treated it as his own, which he could not, and probably would not, have done had he delivered the deed, or intended a delivery thereof, at the time of Almon E. North's visit to him. In addition to this, it is conclusively shown by the uncontradicted evidence that on the day before the ceremonial marriage between the plaintiff and Brown, and after their marriage, he asked

her to sign the deed so that her interest in the land would be released. Mr. Brown was at that time a man past seventy years of age. He had had large business experience, and was then, and had been for many years, the owner of considerable real property, most of which was rented, and all of which he had immediate charge of. It is to be presumed that he knew the law governing the rights of Mrs. Brown as his wife, and it would certainly be a violent presumption to say that he did not know that, if he had delivered the deed to Almon E. North, it would have made a complete conveyance of the land, and that, so far as the ceremonial marriage between him and the plaintiff was concerned, she could claim no interest in the land as his widow. The question whether or not there had been a delivery of a deed is one largely of intent, which intent is to be gathered from the facts and circumstances surrounding the transaction in connection with the positive proof. This principle of law is thoroughly settled in this and other jurisdictions, but see *Forman v. Archer*, 130 Iowa, 49; *Kneeland v. Cowperthwaite*, 138 Iowa, 193; *Criswell v. Criswell*, 138 Iowa, 607. Bearing this in mind as applied to the testimony in this case, we are thoroughly convinced that there was no delivery of the deed in the case prior to the 31st day of August, 1905, and that the trial court rightly found the plaintiff entitled to an interest in the land in question as the widow of Thos. J. Brown.

Our conclusion on this branch of the case really makes it unnecessary to consider the question raised on the plaintiff's appeal, and we shall enter upon no extended discussion thereof. We may properly say, however, that were it necessary to determine the question, we should hesitate long before reaching the conclusion announced by the trial court. The marriage agreement relied upon by the plaintiff was clearly proven, and it was also clearly proven that the agreement was followed by

cohabitation. It is true that the parties did not occupy the same sleeping apartments during the time, nor did they make generally public the fact of such marriage, but it is shown that the plaintiff lived in one of Brown's houses, and that after said alleged agreement he lived there to all intents and purposes, except that he slept in a room, which he had long theretofore occupied, in one of his business buildings, but the testimony shows that in all other respects there was the cohabitation required by the law to consummate and make effective a common-law marriage.

One other point is raised by the appellants that we shall briefly discuss. The partition was ordered by a sale of the real estate in question, and referees were appointed to appraise and make such sale. The trial court also authorized the referees to make the sale partly on time, if necessary, but required a cash payment of about 40 percent of the price of the land and a mortgage back for the balance, with interest on the deferred payments of 6 percent, the deferred payments, if any, not to run over three years. We see no reason for disturbing the order of the trial court. Of course the referees will sell for cash, if it can be done to advantage. If a cash sale can not be so made, it will be to the best interests of all parties to make some concessions both as to credit and time. Furthermore, the matter is still under the control of the trial court, and such further order may be made as to the sale and the terms thereof as shall seem for the best interests of all parties.

The judgment of the district court is *affirmed*.

2. PARTITION:  
terms of  
sale: review  
of order.

GREEN RIDGE FUEL Co., Appellant, v. REBECCA LITTLE-  
JOHN ET AL.

**Landlord and tenant: LEASES: EXECUTION: PAROL EVIDENCE.** A lease  
1 signed by only a portion of the interested parties, under an agree-  
ment that it should not be binding until signed by all, is not  
executed until so signed; and oral evidence of the agreement is  
not objectionable as tending to vary the writing, but is competent  
to show that it never became obligatory.

**Leases: UNILATERAL CONTRACT.** Where the terms of a lease contem-  
2 plate that all the interested parties shall sign the same, and the  
lessee is obligated to work and pay rent for the premises, it is  
not an unilateral instrument.

**Mines and mining: LEASES: ACCEPTANCE.** A lease of coal land exe-  
3 cuted by only a portion of the grantors, with the understanding  
that it was not to be binding until signed by the other grantors  
and the lessee, was not rendered obligatory by the fact that  
the lessee without signing the instrument went onto the premises  
and prospected for coal under a provision that he might do so,  
and if in his opinion coal in paying quantities was found he  
should mine the same and pay a royalty to the lessors, since by  
the terms of the contract it was optional with him whether he  
should mine or not.

*Appeal from Mahaska District Court.*—HON. BYRON W.  
PRESTON, Judge.

MONDAY, FEBRUARY 15, 1909.

WILLIAM A. Littlejohn died testate April 20, 1902,  
survived by a widow, Rebecca Littlejohn, and nine chil-  
dren. By the terms of the will, the use of the realty  
was given to the wife so long as she remained his widow  
and during her natural life, and upon her death the prop-  
erty to be divided between his children, share and share  
alike. The widow accepted under the will, and on the



10th day of October, 1906, she and all but three of the children, Melville B. Littlejohn, Mary A. Smith, and Alta M. Rogers, signed a lease conveying coal underlying the surface on conditions named to the Crescent Coal Company. This company in prospecting discovered coal in workable quantities, and on the 10th day of July, 1907, assigned the lease to the plaintiff. On April 30, 1907, the widow and all the heirs executed a somewhat similar lease permitting the removal of coal on specified conditions to H. C. Miller and A. W. McMillan, and after an extension of time, executed May 20, 1907, these lessees assigned the lease to Andrew Love, who after drilling nine holes sunk a prospecting shaft, and after lifting considerable coal drove an entry. The ultimate issue was whether plaintiff or Love was entitled to mine the coal from the land. The court dismissed plaintiff's petition, and it appeals.—*Affirmed.*

*H. H. Sheriff*, for appellant.

*John F. and Wm. R. Lacey*, and *W. H. Keating*, for appellees Littlejohn and others.

*Bolton & Bolton*, for appellees Love and others.

LADD, J.—The alleged lease to the Crescent Coal Company dated October 10, 1906, was assigned by it to the plaintiff July 10, 1907. The instrument, which for convenience may be designated the first lease, purported to be from the widow and heirs of William A. Littlejohn to the former company; but neither it nor two of the heirs ever signed such instrument, and the guardian of a minor heir had signed his name thereto without an order of court. The lease executed April 30, 1907, by the widow and heirs to Miller and McMillan, and by them assigned to Love, is not challenged save as purporting to permit

the removal of coal previously disposed of by virtue of the first lease under which plaintiff claims.

The controlling question is whether the instrument of May 10, 1906, was binding on the parties thereto at the time the second lease was executed. Appellees con-

1. LANDLORD AND TENANT:  
leases: execution: parol evidence.

tend that the first lease was never executed, and that, if it was, it was subsequently abandoned. The evidence is conclusive to the effect that Crew, representing the Crescent Coal Company, and the widow and heirs in negotiating the lease, expressly agreed orally that the instrument should not be binding on the parties thereto until signed by all the heirs and the company and a copy signed by the company was returned to them. As two of the heirs and the company failed to sign the paper, it never was executed. Appellant, however, argues that oral evidence of the arrangement under which part of the heirs signed was not admissible because tending to vary or contradict a written contract. Such was not the purpose of the evidence, but rather to show that the writing never became obligatory at all, and to do that it was competent. *Sutton v. Weber*, 127 Iowa, 361; *Creveling v. Banta*, 138 Iowa, 47.

But appellant contends that it should be treated as a unilateral agreement. Such was not the intention of the parties, for, apart from the oral arrangement referred to,

2. LEASES: unilateral contract.

by the terms of the lease obligation to work the mine and pay rent or royalty are imposed on the lessee, and the instrument stipulates that the parties are to bind themselves by signing the lease. As it was not so intended, the lease should not be construed as unilateral. *Flanders v. Merrill*, 38 Iowa, 583; *Cross v. Snakenberg*, 126 Iowa, 638.

Nor was such lease accepted and adopted by the parties as to render it binding. True, the lessee was to "test said land by drilling and otherwise, and, in case there

should be discovered a minable vein or basin of coal of sufficient quantity and quality to justify the opening and mining of said coal in the opinion of said party, then they agree to mine out said coal," and pay as stipulated. In other words, it was optional with the company whether it should mine the underlying coal, and it was allowed to prospect in order to enable it to elect whether it would do so. It went upon the land for the purpose of investigation, and not in pursuance of an agreement to mine. Such possession neither bound it to proceed under the lease, nor was it notice of acceptance to the lessors. In prospecting coal was discovered in workable quantities, but the company never so advised the lessors. Indeed, the president of the company testified that "the Crescent Coal Company had never made up its mind as to what it would do," and, believing it "a better proposition to sell the lease than to open the mine," assigned the lease to plaintiff. In so far as disclosed by the record, it may still be in this condition of uncertainty. As it had neither signed the lease nor accepted its terms, the paper never became binding on the parties thereto. The widow and heirs could not have enforced the terms of the lease. *Love v. Atkinson*, 131 N. C. 544 (42 S. E. 966); *Castro v. Gaffey*, 96 Cal. 421 (31 Pac. 363). Nor could the Crescent Coal Company without signing and electing to proceed to mine coal thereunder. Ordinarily time is held to be of the essence of mining contracts, even though not expressly so stated, and parties thereto must be vigilant in asserting their rights thereunder. See *Merk v. Bowers Min. Co.*, 31 Mont. 298 (78 Pac. 519); *Waterman v. Banks*, 144 U. S. 394 (12 Sup. Ct. 646, 36 L. Ed. 479). Whether there has been such delay in this case as to defeat the contract need not be considered, as the lease never became binding on either party thereto, and nothing passed under the alleged assignment to plaintiff.

3. MINES AND  
MINING:  
leases:  
acceptance.

What we have said sufficiently answers the contention that the lease, as it were signed by the widow, a life tenant, was valid.

The petition was rightly dismissed, and the judgment is *affirmed*.

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W. A. JORDAN COMPANY, DURAND & KASPER COMPANY, and W. L. GERBER, Appellants, v. SPERRY BROTHERS, GEORGE K. SPERRY and GRANT E. SPERRY, MRS. LOU FARRIS, BERBERET BROTHERS, and H. EINSPANJER & SON, Appellees.

**Creditors suits: FAILURE TO MAKE DISCOVERY: REMEDY.** The remedy

1 for failure of defendants, in a proceeding auxiliary to execution, to make such answers as the court may direct is not a motion to strike the answers from the files, but a motion to require full and implicit discoveries by process for contempt; and the matter of striking a pleading is so much within the discretion of the trial court that generally an appeal will not lie from the ruling.

**Change of venue.** The ruling denying a change of venue on the  
2 ground of prejudice of the trial judge will not be disturbed except upon a showing of an abuse of discretion.

**Creditors suits: GARNISHMENT: *Res judicata*.** A judgment creditor

3 in garnishment proceedings is bound by a judgment in favor of the garnishee, and cannot relitigate the matter in a subsequent action to subject property of the debtor to the satisfaction of the judgment.

**Election of remedies: GARNISHMENT: EQUITABLE PROCEEDINGS.** Judg-

4 ment creditors who have pursued their garnishment proceedings no farther than to notify the garnishees, have made no such election of remedies as to preclude them from maintaining an equitable action against both the parties and the property.

**Chattel mortgages: PRIVATE SALE OF PROPERTY: CONVERSION.** Where

5 a chattel mortgagor turned over the property to the mortgagee for the purpose of sale and satisfaction of the mortgage note, and it did not appear that the property sold at private sale exceeded the amount of the debt, or that fraud was practiced by any of the parties, the mortgagee was not liable to judgment creditors of the mortgagor for conversion of the property, even though the mortgage was unrecorded and was not foreclosed.

*Appeal from Lee District Court.*—HON. HENRY BANK, JR., Judge.

MONDAY, FEBRUARY 15, 1909.

CREDITORS' bill to subject certain property to the payment of judgments against Sperry Bros. The trial court dismissed the petition, and plaintiffs appeal.—*Affirmed.*

*John L. Benbow*, for appellants.

*Herminghausen & Herminghausen*, for appellees.

DEEMER, J.—Each of the plaintiffs obtained several judgments against Sperry Bros., George K. Sperry and Grant E. Sperry. The Jordan Company and the Durand & Kasper Company sued out executions on their judgments, and thereunder defendants herein, Mrs. Lou Farris, Berberet Bros., and H. Einspanjer & Son, were garnisheed on or about November 7, 1904, and notified to appear at January term, 1905, of the district court of Lee County. Pursuant to notice, they appeared, but their answers were not taken. On November 19th the two plaintiffs last above named commenced this suit which they denominate a creditors' bill against all the defendants above named. This suit was commenced in the district court of Lee County, and in the petition it was alleged that a certain chattel mortgage made by the Sperrys on or about January 6, 1904, to Mrs. Lou Farris upon a stock of merchandise was invalid because withheld from record by agreement until October 21, 1904, and then recorded, and that it was withheld for the purpose of inducing others to give credit to the Sperry Bros. It was also alleged that Sperry Bros. had transferred their books of account to Einspanjer & Son for the purpose of hin-

dering, delaying, and defrauding their creditors. It was also pleaded that Berberet Bros. had possession of a certain delivery wagon covered by the mortgage to Lou Farris, and that plaintiffs' rights thereto were superior to those of said defendants. Defendants answered, denying the allegations of the petition. Plaintiffs thereupon moved the court to require defendants to more fully answer the petition, claiming that they had not complied with section 4088 of the Code. They also moved for judgment because of the want of sufficient answers. These motions were both overruled, and thereupon plaintiffs filed a motion for change of place of trial or for a hearing before another judge. This motion was submitted and denied. Thereafter, and on October 21, 1905, plaintiff W. L. Gerber came into the case by leave of court, joining with the other plaintiffs in the relief demanded, and pleading a judgment obtained by him against Sperry Bros. and the individual members of the firm on February 23, 1905. He also pleaded that he had garnisheed the defendants Farris, Berberet Bros., and H. Einspanjer & Son, and that these garnishees had answered, denying that they were indebted to Sperry Bros. or the firm. He also repleaded the matter stated in the original petition filed in the case. Defendants answered the petition of Gerber, denying most of the allegations thereof and pleading a former adjudication growing out of the garnishment proceedings which they said had proceeded to judgment in their favor. Plaintiffs then replied, denying any former adjudication. Upon these issues the case was tried to the court, resulting in a decree finding that the plea of former adjudication as to W. L. Gerber was good, that plaintiffs' petition be dismissed, and that plaintiffs pay the costs of the proceeding. Whilst the action is in equity and is triable *de novo*, some errors are assigned which must be considered before we go to the real merits of the controversy.

I. It is argued that plaintiffs' motion to strike the defendants' answer, which was simply a general denial, should have been sustained, and that the court should have required a full discovery from them as required by section 4088 of the Code, which reads as follows: "Answers Verified

1. CREDITORS  
SUITS: failure  
to make dis-  
covery:  
remedy.

—Petition Taken as True. The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt; or, upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require, the same, or such part not thus answered, shall be deemed true, and such order made or judgment rendered as the nature of the case may require." The exact point made here is that the trial court was in error in not striking defendants' answer from the files. Whilst the statute requires such answers as the court may direct, the remedy for failure to make them is not by motion to strike, but to require full and explicit discoveries by process of contempt. If an answer be informal, redundant, or otherwise, so long as it tenders an issue, the remedy is not by motion to strike, but for more specific statement or by demurrer. Code, sections 3575, 3617, 3630. *Walker v. Pumphrey*, 82 Iowa, 487. The matter of striking a pleading is so much within the discretion of the trial court that generally an appeal will not lie from such ruling. *Allen v. Church*, 101 Iowa, 116; *Allen v. Cook* (Iowa), 71 N. W. 534.

II. The motion for change of venue was bottomed upon prejudice of the district judge. No such abuse of legal discretion is shown in the ruling denying the change as to justify our interference. *Petty v. Hayden*, 115 Iowa, 212.

III. One of the main questions in the case is the correctness of the trial court's holding on the question of

2. CHANGE OF  
VENUE.

former adjudication in so far as plaintiff Gerber is concerned. In the garnishment proceeding brought by Gerber, the garnishees answered, denying liability to Sperry Bros. or the individual members of the firm. This answer was controverted by Gerber, and in his pleading he tendered the very issues against Mrs. Farris which he presents in this case. On the issue thus presented there was a judgment in favor of Mrs. Farris. This, without doubt, amounted to an adjudication of the question of the liability of Mrs. Farris to plaintiff Gerber. As to defendant Berberet Bros., they were sought to be held because they purchased a wagon formerly owned by Sperry Bros. from Mrs. Farris, and, being in privity with her, they are entitled to the benefit of the adjudication in her favor. Einspanjer & Son were sought to be held as garnishees by reason of having received certain accounts or account books from Sperry Bros. The record shows that, at the conclusion of the evidence upon the Gerber garnishment proceedings, Einspanjer & Son, moved that they be discharged as garnishees. This motion was sustained, and they were released and discharged. As Gerber is now attempting to hold these people on the identical theory upon which he proceeded in the garnishment proceedings, he surely is bound by the results of the latter proceedings, and can not relitigate the matter now. This is fundamental law, and the following, among other, authorities, support the conclusions: *Madison v. Garfield*, 114 Iowa, 63, and cases cited, and *Simmons v. Dolan* (decided at present term) 119 N. W. 690.

IV. Of course, this adjudication is not binding on the Jordan Company or the Durand & Kasper Company; but it is insisted that having started the garnishment proceeding, they elected that remedy, and can not now proceed by equitable levy. As they did not pursue their remedy

2. CREDITORS  
SUITS:  
garnishment:  
*res adjudicata.*

4. ELECTION OF  
REMEDIES:  
garnishment:  
equitable  
proceedings.



further than to notify the defendants that they were garnisheed, there was no such election as prevented their following the matter up with an equitable proceeding against both the parties and the property. With reference to the delivery wagon which went to Berberet Bros., and which it is claimed belonged to Sperry Bros., there is absolutely no testimony to justify a finding against them. They purchased in good faith from Mrs. Farris, paying value, and the trial court was clearly right in dismissing the petition as to them. As to Einspanjer & Son, the testimony shows that they took an assignment of Sperry Bros.' books of account to satisfy a claim they had against the Sperry Bros. amounting to \$58. The books showed debts to the amount of \$370, but the testimony shows that most of these were worthless, and that they had not been able to collect more than \$56 thereon. There is an entire absence of fraud in this matter.

V. The only serious or debatable question in the case is the liability of the defendant Mrs. Farris to the two plaintiffs, the Jordan Company and the Durand & Kasper Company. About January 1, 1904, Sperry Bros. purchased of Mrs. Farris a grocery and bakery stock and business in the city of Ft. Madison for the sum of \$1,153, paying \$100 in cash, and giving a note for the balance, which was secured by mortgage upon the property conveyed. The note was payable in monthly installments of \$100 each, and the makers agreed to keep the stock up to its value at time of purchase. They also rented the building in which the business was to be conducted from Mrs. Farris, agreeing to pay her as rental therefor the sum of \$30 per month. The mortgage was not recorded until October 29, 1904, when the mortgagee took possession of all the stock and other property belonging to the mortgagors. After taking possession, Mrs. Farris sold the wagon hitherto mentioned to Berberet Bros. and to one

5. CHATTEL  
MORTGAGES:  
private sale  
of property:  
conversion.

Ben Nelle some other property amounting to \$188.64. Plaintiffs claim that the mortgage was fraudulent because withheld from record by the mortgagee, that the mortgagee, having taken possession of the property covered by the mortgage and without foreclosure having sold the same, and in allowing and permitting dealers to extend credit to Sperry Bros. on the strength of the title being unincumbered, were guilty of such fraud or collusion as makes them liable to plaintiffs, who were and are creditors of Sperry Bros. Plaintiffs have failed to show that the mortgage was withheld from record by agreement either express or implied—indeed, the contrary fairly appears from the testimony. Sperry Bros. supposed it was recorded, and Mrs. Farris, being a woman without business experience, did not understand the necessity for placing it on record. There is no evidence to justify a finding of fraud by reason of the withholding the mortgage from record. There is testimony in the case showing such fraud on the part of Sperry Bros. in purchasing goods after they had given the mortgage as would have justified the sellers in rescinding the sales; but there is not sufficient testimony to connect Mrs. Farris therewith. The action is not brought by the sellers to rescind, but to recover the purchase price of the goods sold. The conduct of the mortgagee after taking the goods covered by the mortgage did not amount to a conversion. The testimony shows that the goods covered by the mortgage were turned over to Mrs. Farris that she might make the amount of her note out of the same, and, pursuant to that plan, she sold the delivery wagon and the other goods referred to at private sale as she had a right to do. There is no showing that the goods exceed in value the amount of the debt owing Mrs. Farris, and no reason appears for holding her liable for the amount of plaintiffs' judgments. The trial court saw and heard all the witnesses, and, while there is some conflict in their testimony, we see no reason

for disturbing the decree entered. Appellees' motion to strike evidence and affirm is overruled.

The decree must be, and it is, *affirmed*.

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WILLIAM CREE, Trustee, Appellee, v. BRADLEY'S BANK  
OF MYSTIC, Appellant.

**Admission of evidence:** HARMLESS ERROR. Reversal of a cause  
1 will not be ordered because of the admission of immaterial evidence which is in no manner prejudicial.

**Bankruptcy:** RECOVERY OF PREFERENCE: EVIDENCE. It is incumbent on  
2 a trustee in bankruptcy to show that he has not sufficient assets in his hands to pay the claims filed and allowed against the bankrupt before he can recover a preference made by him; and as evidence of that fact he may introduce the schedule of claims filed and allowed by the referee.

**Same:** PROOF OF ANOTHER ACTION PENDING. Evidence that a trustee  
3 in bankruptcy had instituted an action against the purchaser of his property for its value, is not admissible in defense of another action by the trustee against the party to whom the proceeds were paid as an alleged preference; as one action is not dependent upon the other.

*Appeal from Appanoose District Court.*—HON. C. W.  
VERMILLION, Judge.

MONDAY, FEBRUARY 15, 1909.

THIS is an action by the plaintiff, as trustee in bankruptcy, to recover of the defendant bank money paid to the said bank by the bankrupt as a preferred payment within four months next preceding the adjudication of bankruptcy. Verdict and judgment for the plaintiff, and the defendant appeals.—*Affirmed*.

*Frank S. Payne*, for appellant.

*H. E. Valentine*, for appellee.

EVANS, C. J.—In January, 1906, James H. Stevens was adjudicated a bankrupt. On October 18, 1905, he paid to the defendant bank the sum of \$1,400 on a debt owing by him to said bank. The plaintiff alleged, and defendant denied that it had any knowledge or reasonable cause to believe that such payment was intended as a preference, and this denial presented the only issue of fact in the case.

The bankrupt was a hardware dealer in the town of Mystic, and had been indebted to the bank in various amounts for a long period of time. On October 16, 1905, he sold his stock of hardware in lump to one Swanson for the sum of \$1,600, and received Swanson's check therefor. He indorsed this check to the bank in payment of the debt before mentioned, and received the difference. The cashier who received the check from the bankrupt said that he did not know at that time that the bankrupt had sold his stock of goods to Swanson. At the time of the transaction, and for some time previous thereto, the bank was holding a large number of drafts drawn on the bankrupt by various creditors, all of which it returned soon after the transaction. The bankrupt had no other property except his homestead, which was heavily incumbered by a mortgage to the bank.

I. One Teagarden was a witness on behalf of the plaintiff. His wife had been a former partner of the bankrupt, and had sold out her half interest to him about ten months previous to his sale to Swanson.

1. ADMISSION  
OF EVIDENCE:  
harmless error.

The witness testified that the consideration for such sale was \$1,500. This testimony was received by the court over the objection of the defendant. We are unable to see any materiality to this testimony. Nevertheless it is manifest that it could not have been prejudicial.

Swanson was also examined as a witness on behalf of the plaintiff. The following question was propounded to him: "Q. What, if anything, was said by you to people who came into the store about the change of ownership?" Defendant objected to this question as incompetent and immaterial, and the objection was overruled. "A. I expect that I told them that I had bought the stock." Appellant urges this ruling upon our attention. We are not able to see either materiality or competency to this question and answer, but it is plain, also, that there is nothing in this testimony calculated in any degree to prejudice the defendant. It is undisputed in the record that the store was sold to Swanson, and that he took immediate possession. There is no claim of secrecy in the change of ownership.

II. For the purpose of showing that the bankrupt was insolvent, the trustee testified that he had received no property, and that he had been able to find no property. The record of the bankruptcy proceedings was also introduced in evidence including the schedule of creditors' claims filed and allowed by the referee. To this latter evidence the defendant objected as incompetent and as not binding on the defendant, because not a party to the proceedings. This objection was overruled, and the defendant urges error on the ruling. There was no error in the ruling. It has heretofore been held by this court that it is incumbent upon the trustee to show that he has not sufficient assets of the bankrupt to pay the claims filed and allowed against him. *Deland v. Bank*, 119 Iowa, 368; *Roney v. Conable*, 125 Iowa, 664; *Crary v. Kurtz*, 132 Iowa, 105. It appears to have been held otherwise in *Cullinane v. State Bank of Waverly*, 123 Iowa, 349. This case seems to be inconsistent with our other cases on that subject. We are united in the opinion that the record of the allowance of claims by the referee is ad-

2. BANKRUPTCY:  
recovery of  
preference:  
evidence.

missible in evidence in proof of the indebtedness of the bankrupt. In so far as the *Cullinane* case, *supra*, is inconsistent with this view, it will be deemed overruled.

III. On cross-examination of the plaintiff, the defendant undertook and offered to prove by him that he had instituted a suit then pending against Swanson for \$3,500,

being the alleged value of the goods purchased by Swanson from the bankrupt. The court ruled out the proffered testimony.

3. SAME: proof of another action pending.  
The defendant also offered in evidence the petition filed by the trustee in the *Swanson* case. This, also, was ruled out, and of these rulings the defendant complains. The argument in support of defendant's contention at this point is that, if the plaintiff had a cause of action against Swanson for \$3,500, he had no need to recover against the defendant. If this argument could defeat the plaintiff in this case, a like argument could defeat him in the *Swanson* case. If a right to recover from Swanson would defeat his right to recover from the defendant, then his right to recover from this defendant would defeat his claim against Swanson. There is fallacy in the argument. One action can not be made dependent upon the other. There was no error in this ruling. Plaintiff's right of action is purely statutory. The statute does not recognize the exception which defendant would thus engraft upon it. Whether plaintiff's causes of action in each case are substantially identical in their subject-matter, and whether plaintiff will be entitled to more than one satisfaction, is a question not involved herein.

IV. The only other error assigned by the defendant is that the verdict is not sustained by the evidence. We have examined the evidence with care. It will subserve no useful purpose to set it out at length. It was sufficient to warrant the jury to find that the defendant bank had reasonable cause to believe that its debtor was insolvent and that the payment in question was a prefer-

ence, and was intended as such. The case was submitted to the jury upon instructions of which the defendant does not complain.

We find in the record no ground for reversal. The judgment below is therefore *affirmed*.

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THE CITY OF OSKALOOSA, Appellant, v. THE OSKALOOSA  
TRACTION AND LIGHT COMPANY.

**Street railways: PAVING: ASSESSMENT: CONCLUSIVENESS.** Where a  
1 city council simply undertakes to determine the value of paving  
that portion of a street which is chargeable to a street car com-  
pany, for the benefit of abutting owners, under Code section 835,  
its determination, though unappealed from, is not conclusive of the  
company's liability therefor.

**Same: RECOVERY FROM STREET CAR COMPANY.** Where a street car com-  
2 pany lays its tracks along a paved street it can only be required,  
under the provision of Code, section 835, to pay to the city for  
the benefit of abutting owners the value of that portion of the  
paving between and adjacent to its tracks, which has been appor-  
tioned among abutting owners and to whom compensation has  
been directed to be made; it cannot be compelled to pay the  
value of such improvement either to an old street car company  
whose rights have been completely forfeited, nor to the city  
claiming in its own right because of the fact that the street abuts  
upon a public square.

*Appeal from Mahaska District Court.*—HON. W. G.  
CLEMENTS, Judge.

MONDAY, FEBRUARY 15, 1909.

ACTION to recover from defendant the value of the  
paving between its rails and within one foot outside there-  
of, where its track was laid through paved streets in  
plaintiff city. On trial to the court without a jury  
judgment was rendered for plaintiff to the amount of a

portion only of its claim, and on account of refusal to allow the portions of the claim rejected the plaintiff appeals.—*Affirmed.*

*C. C. Orvis and John O. Malcolm, for appellant.*

*John F. & William R. Lacey, for appellee.*

MCCLAINE, J.—Defendant constructed its track through plaintiff's paved streets in 1902, under an ordinance authorizing it to do so. At that time a statute was in force (since amended) requiring any street railway company laying its track upon any paved street to "pay into the city treasury the value of all paving between its tracks and one foot outside thereof, which value shall be determined by the city council . . . and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amount originally assessed against the property abutting thereon." Code, section 835. The city was allowed to recover various sums for specified abutting property owners alleged to be due and payable under the terms of this statute, but was refused an allowance of any amount for certain portions of the paving between the rails of defendant's track, in portions of the streets previously occupied by another street car company, the franchise of which had been revoked, and it is of such refusal that complaint is made on this appeal.

A preliminary question is presented as to the effect of what is called an assessment by the city council against defendant's grantor, from which no appeal was taken, and

it is claimed that such assessment is conclusive as to defendant's liability. But the question to be determined by the city council under the statute is as to the value of the paving, and not as to the liability of the street car company therefor, or the amount to be collected on behalf of each abut-

1. STREET RAIL-  
WAYS: paving:  
assessment:  
conclusiveness.



ting owner. At any rate this was the construction put upon the statute by the city council, which determined that for certain specified portions of defendant's track it should pay 40, 50, or 60 percent, as the case might be, of the original cost of paving. The council did not attempt to determine the sums to be paid on account of particular abutting owners, nor did it fix any amount which defendant was to pay in pursuance of such assessment. Under these circumstances the assessment was not an adjudication of defendant's liability. The amount to be paid was left for subsequent adjustment or recovery by suit. The provision for appeal from the assessment added to Code, section 835, by Acts 30th General Assembly (see Code Supp. 1907, section 835) if applicable to an assessment made prior to the taking effect of the amendatory statute, relates only to the determination of the value of the pavement, and not to the fixing of the liability of the street car company to the persons entitled to recover under the statute.

Referring again to the statutory provision on which defendant's liability is predicated, it is evident that the plaintiff city can recover only on behalf of the abutting property owners to whom compensation is

a. SAME: recovery from street car company.

directed to be made; that is to say, the city is entitled to recover such money as it is directed to refund, in the event of recovery, to the abutting property owners. There is no provision for recovering any sum which is not to be thus refunded by apportionment among such property owners. The city is not entitled to recover in its own right, unless it is an abutting property owner within the language of the statute. It is not contended that any sum was due to it as an abutting property owner and the court allowed recovery in all amounts claimed on behalf of property owners specified, and the sole question, as we understand the record, is whether the city had the right to recover for the por-

tion of the pavement which was originally included between the tracks of a street car company whose franchise had been declared forfeited, and whose tracks had been removed from the street prior to the enactment of the statutory provision above referred to. Before the enactment of the present statute it was optional with the city council to require a street car company to pay for a portion of the paving of the street in which its tracks were laid. *Lacey v. Marshalltown*, 99 Iowa, 367. As we understand this record, the street car company previously occupying the streets had not been required to pay for the portion of the pavement between its rails, but had been authorized to lay its tracks and operate its road without such payment. See *Oskaloosa Street R. & L. Co. v. City of Oskaloosa*, 99 Iowa, 496. However this may be, it can not be contended that the old street car company, whose rights in the streets have been fully and completely forfeited and extinguished, is in any sense an abutting owner so as to be entitled to compensation under the present statute on account of pavement laid between its rails. Neither steam railway companies nor street railway companies enjoying easements in a street are assessable as abutting property owners for the improvement of the street. Their liability is only such as is specially imposed by proper statutory provisions. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300; *Ft. Dodge, E. L. & P. Co. v. City of Fort Dodge*, 115 Iowa, 568. Nor is the city, as owner of the street, an abutting property owner. *Council Bluffs v. Omaha & C. B. S. R. & B. Co.*, 114 Iowa, 141. Although the streets to which this controversy relates adjoin a public square, it is not contended that the city is the owner of such square and on that account an abutting property owner.

We are unable to see any authority in the statute for compelling the defendant company to pay the value of the pavement between its rails, either to the old street car

company, whose rights have been completely forfeited, or to the city. Even if the old company had paid for such pavement, it was not, at the time defendant's track was laid, the owner of any property in or abutting the street, and therefore the city, whatever its rights with reference to the old company, is not the owner of such pavement otherwise than as it is the owner of all the pavement in the street. As already indicated, we find nothing in the statute requiring payment by the defendant company of the value of any pavement to the city claiming in its own right. As all the claims of abutting owners were allowed, we think the court gave to the plaintiff all the relief to which it was entitled, and the judgment is *affirmed*.

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**MARTHEY UNDERWOOD, Appellant, v. MODERN WOODMEN OF AMERICA, Appellee.**

**Mutual insurance: STIPULATION: ESTOPPEL.** Where by the terms of a stipulation in a suit on a benefit certificate involving the question of a claimed delinquent assessment, there was repeated reference to the assessment as having been made for the month of October, and it was conceded that if the method provided for giving notice of assessments was valid the defense based on nonpayment was complete, the plaintiff was estopped to deny that the assessment was due for the month specified.

**Same: NOTICE OF ASSESSMENTS: SUFFICIENCY.** The agreement between a mutual assessment association and its members that notice of assessments shall be given by means of a printed publication, addressed and mailed in due time to each member, is not so unreasonable as to render it void; and conceding that a further provision making the affidavit of the publisher conclusive evidence of the mailing and receipt of the notice to be unreasonable, still such proof under the agreement would be a sufficient *prima facie* showing of notice, unless overcome by other evidence offered by plaintiff.

*Appeal from Scott District Court.*—HON. D. V. JACKSON, Judge.

TUESDAY. FEBRUARY 16, 1909.

ACTION upon a benefit certificate issued on the life of Rollin Underwood. Trial to the court upon an agreed statement of facts. Judgment for defendant. and plaintiff appeals.—*Affirmed.*

*W. M. Chamberlain* and *Walter H. Peterson*, for appellant.

*Truman Plantz* and *Salinger, Scott & Theophilus*, for appellee.

WEAVER, J.—The statement of facts so far as the same is material on this appeal may be condensed as follows: In June, 1902, Rollin Underwood, son of plaintiff, became a member of the defendant society which issued to him a benefit certificate, undertaking at his death and upon the performance of certain conditions to pay to the plaintiff the sum of \$2,000. As a part of the consideration for said benefit, he undertook to pay all dues and assessments regularly levied within the time limit provided by the laws and rules of said society. The society was not of a merely local character, but was extended in the form of local branches or lodges over many states, and had a membership of about 650,000 persons. Assessments were made from time to time by a board of directors, notice thereof being printed in a monthly publication called *The Modern Woodmen*, issued by the society; one copy being mailed to each member in good standing. By a by-law of the society which was in force when Rollin Underwood became a member, this method of notification was provided for, and failure upon part of any member to pay such assessment on or before the 1st day of the month following the date of said notice, or upon failure to pay the quarterly dues to the local camp at or

before their maturity, was made to operate of itself as a suspension from membership, and during such suspension his benefit certificate was to be "absolutely null and void." Rollin Underwood died November 20, 1902, and due notice and proofs of his death were furnished to the defendant, which refused to recognize any liability upon said benefit certificate because of the nonpayment by said deceased of an assessment levied for the month of October, 1902.

As the question here raised concerning the alleged delinquency of the deceased in the payment of said assessment is the one upon which the entire controversy is made to turn, we here quote the stipulation of the parties in respect thereto:

1. MUTUAL INSURANCE: stipulation: estoppel.

(9) It is stipulated between the parties to this action that the matters set out in said answer of Modern Woodmen of America, claimed to be a part of the application made by said Rollin Underwood, were contained in and were a part of said application. It is also stipulated and agreed that a regular and legal assessment by the board of directors of said Modern Woodmen of America for the month of October, 1902, was properly levied and called for the benefit of said Modern Woodmen of America, and that said Rollin Underwood was liable for the payment of said assessment to said Modern Woodmen of America, if legally notified of the same, and that said Rollin Underwood did not pay said assessment, and that the same was not paid by anyone. . . .

(12) It is stipulated and agreed between the plaintiff and the defendant that the only evidence in existence on the question as to whether said Rollin Underwood received the notice of the assessment for October, 1902, is the affidavit of the publisher of said official paper attached to a copy thereof, together with a copy of the mailing list, and that the name of said Rollin Underwood appeared on said list, and that the only matter in dispute in the case is the reasonableness or legality of said sections 47, 48 and 49 of the by-laws.

(13) It is admitted by the plaintiff and the defendant

that in section 47 of the revision of 1901 of the by-laws of said defendant, as herein set out, is a legal by-law and conclusive upon the said Rollin Underwood and his beneficiary, Marthey Underwood, the plaintiff herein, that this action can not be maintained by the plaintiff, and that judgment should be entered in favor of the defendant and against the plaintiff for costs.

The section of the bylaws referred to in the last preceding paragraph is in the following words:

Sec. 47. Mailing Copy of Paper Shall be Notice to Members of Assessments.—Affidavit of Publisher Conclusive Evidence.—The mailing on or before the last day of the month preceding the call for any assessment, or of the issue of the monthly official paper containing notice of any assessment, shall be sufficient service of such notice on each beneficial member of such assessment. The affidavit of the publisher of said official paper, attached to a copy thereof, together with a copy of the mailing list, shall be conclusive evidence of all facts therein stated relative to the publication, mailing, time of publication, and mailing of a copy of said paper to each beneficial member named in said list, and it shall be held, upon such proof, that each beneficial member to whom a copy of said paper has been so mailed, as shown by said affidavit has received notice of said assessment in due time.

In argument counsel for the appellant calls attention to the fact that nowhere in the stipulation of facts is there any express statement of the precise date of the assessment in question, and argues that we can not presume that it had become delinquent in the lifetime of the insured; but, conceding the omission so suggested, we think the appellant is clearly estopped by the stipulation from reaping any advantage therefrom. The stipulation repeatedly speaks of the assessment as having been made "for the month of October," and we think this language is to be fairly construed as referring to an assessment payable during the month named. Moreover, it is agreed

by the thirteenth paragraph of said stipulation that if section 47 of the by-laws is a legal by-law, and conclusive upon the member and the beneficiary, then "this action can not be maintained by the plaintiff, and judgment should be entered in favor of defendant for costs." This in effect is a concession that, if the method of giving notice provided for in section 47 of the by-laws is legal and valid, then the defense based on the nonpayment of the assessment for October is complete, and under such stipulation we must confine our attention to the legal sufficiency of the by-law to which reference is made.

It is further contended by the appellant that the provision made by section 47 of the by-laws for giving notice to members of assessments made is unreasonable and void. We are not prepared to so hold.

2. SAME: notice  
of assessments:  
sufficiency.

So long as the system of frequent assessments for small sums is allowed, it is manifestly impracticable without very burdensome expense for the directors of a society composed of hundreds of thousands of members scattered over the length and breadth of the land to send to each a notice by registered letter or other direct method of personal communication, and we see no good reason why a provision for general notice by means of a printed publication mailed in due time to the address of each member may not be agreed to by the member as a part of the contract between him and the society. Counsel's chief objection to this by-law seems to be in the provision giving conclusive effect to the affidavit of the publisher attached to the mailing lists of the paper containing the notice. We may concede for the purposes of this case, though we do not now decide, that, so far as it seeks to make the affidavit conclusive evidence of the mailing and receipt of the notice, it is unreasonable, and to uphold it to that extent would put it within the power of a single officer or employee of the society by a false or mistaken affidavit to invalidate the

benefit certificate of every member without recourse or remedy for those injured by his negligence or wrong. But there is no apparent unreasonableness in treating such proof under the agreement of the parties as at least a sufficient *prima facie* showing that the directorate has done its duty, and that notice has been duly given of the assessment to the membership. Giving it this effect, the plaintiff must fail in her appeal, for by the twelfth paragraph of the stipulation it is conceded that there is no other evidence upon the question whether Rollin Underwood received the notice than such as is offered by the mailing lists of the publication containing said notice and the affidavit of the publisher thereto attached. To say the very least, we think the burden was upon the plaintiff to overcome the *prima facie* sufficiency of the evidence to the use of which Rollin Underwood had agreed by his contract of membership. This was not done, and there was no error in rendering judgment in the defendant's favor.

We do not undertake any review of the authorities cited by counsel on either side. An examination of them discloses nothing out of harmony with the conclusion above announced which is grounded upon elementary principles of the law of contracts. The judgment of the district court is *affirmed*.

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NEVA CARR, Appellant, v. GEO. W. WAY, Appellee.

**Trial:** REOPENING OF CASE: REVIEW. The matter of reopening a case  
1 for the admission of further testimony is largely discretionary,  
and the action of the trial court will not as a rule be interfered  
with unless the other party has not had a fair opportunity to meet  
the same.

**Husband and wife:** FRAUDULENT CONVEYANCES. A wife who is a  
2 creditor of her husband may take a valid conveyance from him  
of property in satisfaction of his debt, unless in doing so she  
participates in his intent to defraud other creditors; but if she pur-



chases with knowledge of his fraudulent intent, no matter what her purpose may be, she is not a good faith purchaser.

**Same:** CONSIDERATION: BURDEN OF PROOF. The relation of debtor and creditor does not exist when a wife permits her husband to take and use her property for the benefit of the family with no agreement to pay her therefor, and a conveyance of property to her in consideration therefor is voluntary and void as against other creditors of the husband; and in such cases the burden is upon the wife to show that the husband had other property sufficient to pay his debts.

**Same:** TRANSACTIONS BETWEEN HUSBAND AND WIFE. Courts will scan transactions between a husband and wife closely where the rights of creditors are involved.

*Appeal from Mahaska District Court.*—HON. W. G. CLEMENTS, Judge.

TUESDAY, FEBRUARY 16, 1909.

SUIT in equity to set aside a sheriff's deed and to quiet plaintiff's title to a certain lot in the town of Barnes City. Decree dismissing plaintiff's petition, and she appeals.—*Affirmed.*

*Shangle & Gordon*, for appellant.

*S. V. Reynolds* and *J. C. Williams*, for appellee.

DEEMER, J.—In February of the year 1902 defendant herein brought action against one J. F. Carr upon a promissory note and caused a writ of attachment to issue which was levied upon lot 3 in block 15 of Well's addition to the town of Barnes City. Carr appeared and moved to dissolve the attachment because it was levied upon a lot in block 15 instead of a lot in block 13, but this motion does not seem to have been disposed of. Thereafter and on March 5, 1903, judgment was obtained against Carr upon the note in suit. March 7th of the same year execution was issued and a levy made on lot

3, block 13, of Well's addition, and after due notice a sale was had, Way being the purchaser thereat. Something like a year afterward Way received a sheriff's deed for the property. Plaintiff, who is the wife of J. F. Carr, thereupon brought this action to set aside the deed and to quiet her title to the lot. During the pendency of the action upon the note, Carr deeded the lot to his wife by deed which expressed a consideration of \$780, and he claimed that this was made in satisfaction of an indebtedness which Carr owed his wife. The trial court found that this conveyance was fraudulent and dismissed the plaintiff's petition. For plaintiff it is contended that the trial court erred in not rendering judgment for the plaintiff at the conclusion of defendant's testimony and in permitting him to reopen the case for the purpose of taking further evidence.

The matter of opening a case for the reception of additional testimony rests largely in the discretion of the trial court, and we do not as a rule interfere with the ruling of the trial court on such applications unless the other party has not been given time or opportunity to meet the additional testimony. With this testimony admitted, we have nothing left in the case save the sufficiency of the testimony to show that the conveyance from Carr to his wife was without consideration, or made with intent to defraud creditors of whom defendant was one. There is also a claim that the property levied upon was a homestead and not subject to sale for the husband's debts.

Plaintiff claims that she was a creditor of the husband, that she took the conveyance in satisfaction of the debt, and for other considerations at the time paid, without notice or knowledge of the attachment or of defendant's claim against her husband. The conveyance was made pending the litigation, and we have no doubt that thereby J. F. Carr was

1. TRIAL: reopening of case: review.

2. HUSBAND AND WIFE: fraudulent conveyances.

intending to defraud the defendant. If plaintiff herein was a creditor of her husband, she might accept payment of her debt by means of the conveyance, unless she was joining with her husband in his attempt to defraud, and thereby intended to defraud, the defendant. If she was a purchaser of the property as she claims, and with knowledge of her husband's fraudulent intent, no matter what her purposes, she can not be held to be a good-faith purchaser. The distinction between the rights of a creditor who is endeavoring to protect his claim, and of a purchaser who has no claim to protect but who buys with knowledge or notice of his grantor's fraud, is apparent and is well sustained by authority. *Rosenheim v. Flanders*, 114 Iowa, 291; *Joyce v. Perry*, 111 Iowa, 567; *Johnson v. Johnson*, 101 Iowa, 405. We are fully satisfied from a reading of the record that J. F. Carr made the conveyance with intent to defraud the defendant, and that his wife, plaintiff herein, had knowledge of that fact, or sufficient notice to put her upon inquiry which would, if pursued, have resulted in such knowledge.

As to the consideration for the conveyance, the only claim made by her is that at the time of her marriage to Carr her relatives gave her some chickens which she allowed her husband to sell from time to time, he receiving therefor something like \$50, and that her grandfather gave her a cow, which her husband traded for another, and which other he traded for some lumber, which afterward went toward the improvement of a house upon the lot. It is also claimed that plaintiff turned over two calves to her husband, amounting to something like \$14.25. With reference to this property we are satisfied that it was taken and used by the husband without any agreement on his part to pay his wife therefor and without any thought on the part of either that the relation of debtor and creditor existed. The property was not worth, in any event,

3. SAME: consideration: burden of proof.

more than \$100, yet the deed recites a consideration of \$780. Where the wife allows the husband to take and use her property for the support or use of the family or otherwise without an agreement on his part to pay her therefor, the relation of debtor and creditor does not exist, and a conveyance made on account of the use of such property is voluntary and invalid as against other creditors *Romans v. Maddux*, 77 Iowa, 203. The conveyance was made during the pendency of the suit of defendant against J. F. Carr, was made at the suggestion of the husband, and not at the wife's instance, and, if for any consideration in fact, it was small, although a large one was expressed in the deed, and the grantor undoubtedly intended thereby to defraud his creditors. We are constrained to hold that the conveyance was wholly voluntary, and in such cases the burden is upon the grantee to show that the grantor had other property sufficient to pay his debts. The record does not establish this latter fact.

The conveyance misstated and exaggerated the consideration paid, and the circumstances surrounding the transaction are suspicious. It is the duty of the courts to scan such transactions closely, for the presumptions are against the *bona fides* of such arrangements. *Hamill v. Augustine*, 81 Iowa, 302, and cases cited.

Upon the whole record, we are satisfied that the trial court was right in dismissing the petition.

The decree must be, and it is, *affirmed*.

4. SAME: transactions between husband and wife.

**JOHN W. HALL, Appellant, v. THE WABASH RAILWAY CO.**

**Eminent domain: CONDEMNATION OF RIGHT OF WAY: NOTICE.** The  
1 owner of adjacent tracts of land over which a railway has been  
located may describe the same as an entirety in his application  
for the appointment of a sheriff's jury to assess the damages, and  
in the notice served upon the railway company; and when the  
location of the right of way is not specified in the notice and  
return of the appraisers, otherwise than as upon and across the  
land, the proceedings should not be construed as a demand for  
damages for a portion of the right of way which it had been de-  
termined on appeal that he did not own, and his application on  
that ground should not be dismissed.

**Same: ASSESSMENT OF DAMAGES.** Where it was a matter of record  
2 that the plaintiff in condemnation proceedings never acquired the  
ground from which the right of way was taken over one of two  
tracts described in the proceeding, it will be presumed in estimat-  
ing the damages to his farm that the jury took into consideration  
only the damage to the other tract, but if this were not true the  
error could be corrected on appeal to the district court.

**Same.** The issues in condemnation proceedings are the same on ap-  
3 peal as before the sheriff's jury, though the estimate of damages  
is to be made without reference to the award appealed from.

*Appeal from Monroe District Court.*—HON. FRANK W.  
EICHELBARGER, Judge.

TUESDAY, FEBRUARY 16, 1909.

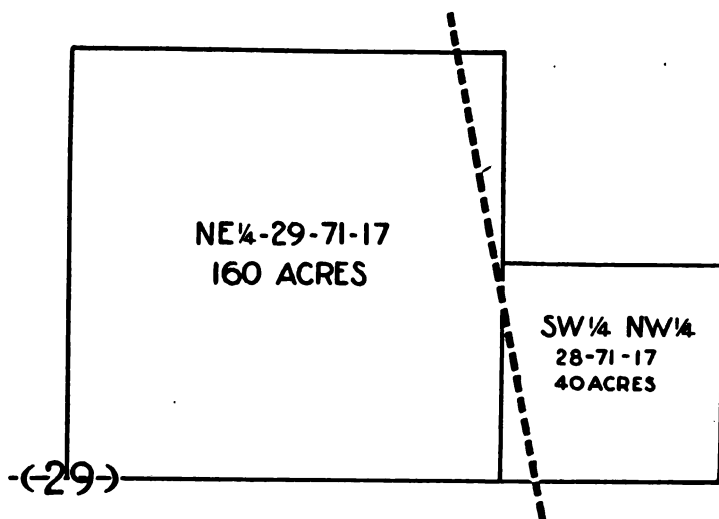
ON August 8, 1902, plaintiff served notice on the  
sheriff, advising him that defendant had located a railroad  
from Albia to Moulton, and that "the said Wabash Rail-  
road Company having refused to make compensation to  
John W. Hall, owner of the Northeast  $\frac{1}{4}$ , section 29, and  
Southwest  $\frac{1}{4}$  of the Northwest  $\frac{1}{4}$ , section 28, township 71,  
range 17, in Monroe County, Iowa, upon and over which

said railway is located, and the owner of the said real estate and the said Wabash Railroad Company being unable to agree upon the compensation to be paid for said railroad right of way, you are hereby requested by John W. Hall, the owner of the real estate above described, to appoint six freeholders of said county as by law provided to inspect said real estate, and assess the damages to said owner by reason of the appropriation of his land for the use of said corporation for right of way purposes, and make report in writing to you." On the following day a notice of like purport, and saying that the commissioners would view the premises for the purpose of ascertaining and assessing the damages on August 21, 1902, at 11:15 o'clock a. m., was served on defendant. The commissioners met at the time and place specified, and assessed "the damages to the owner of the northeast quarter, 29 and southwest quarter northwest quarter, 28—71—17, in Monroe, Iowa, by reason of the location, construction and operation upon and over said land of a certain line of railroad by the Wabash Railroad Co.," at \$1,100. From this award the defendant appealed, and on trial in the district court this was increased to \$1,200. From judgment thereon the defendant again appealed, and this court reversed the judgment because of the error of the district court in instructing that plaintiff was entitled to recover for the right of way over the forty acres in section 28, for that it had been expressly excepted from the deed under which plaintiff claimed. On remand to the district court defendant moved that the case be dismissed, and the motion was sustained. The plaintiff appeals.—*Reversed.*

*Ben McCoy, R. T. Mason, and Fred Townsend, for appellant.*

*Perry & Perry, for appellee.*

LADD, J.—The plaintiff was owner of the N. E.  $\frac{1}{4}$  of section 29, and the S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  of section 28. The track of the defendant extended over this land as indicated in the plat:



As was determined by this court on a former appeal (133 Iowa, 714) because of an exception of the right of way in the deed of the forty acres under which plaintiff claimed, he is not entitled to damages there-

for, but his right to damages for the taking of the right of way over the one hundred and sixty acres is ruled by *Remey v. Railway*, 116 Iowa, 133, and *Russell v. Railway* (Iowa), 99 N. W. 1131. Upon remand the district court seems to have been of opinion that, inasmuch as plaintiff might not have had damages assessed for the right of way over the forty acres by the sheriff's jury, the district court acquired no jurisdiction by the appeal from the award of that body, and for this reason dismissed the cause. Such a conclusion is obviated by two circumstances appearing of record: (1) The two tracts of land are adjacent, and are described in

1. EMINENT DOMAIN: condemnation of right of way: notice.

the notice to the sheriff demanding the appointment of commissioners to assess damages as an entirety, and also in the notice to the defendant and the commissioner's return; and (2) in none of these is the location of the right of way specified otherwise than upon and over said land. Had the owner intended to exclude the right of way through the forty acres, he might properly have included the several parcels of land as constituting his farm as an entirety in the notice, for, under repeated decisions of this court, the damages to the farm as a whole are to be estimated, rather than to some particular government subdivisions from which the right of way has been taken. *Cook v. Railway*, 122 Iowa, 437; *Peden v. Railway*, 78 Iowa, 131; *Cummins v. Railway*, 63 Iowa, 397; *Lough v. Railway*, 116 Iowa, 31.

It appeared of record that plaintiff had never acquired the ground from which the right of way over the forty acres was taken, and it is to be presumed that the sheriff's jury, in estimating the damages to the farm, took into account the appropriation of the right of way through the one hundred and sixty acres only. If they did include more, the error was such an one as may be corrected on appeal. The decisions relied on by appellee are not inconsistent with this conclusion. In *Chicago, R. I. & P. Ry. Co. v. Hurst*, 30 Iowa, 73, the commissioners assessed damages in favor of Hurst and Smith jointly, and the court held that the former could not prosecute an appeal to the district court without making Smith a party to the proceedings. In *Cedar Falls, I. F. & N. W. Ry. Co. v. Railway*, 60 Iowa, 35, damages for the appropriation of a right of way through the E.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of a section, notice being served on Dows, who was the only party to the condemnation proceedings. Afterwards the Cedar Rapids, Iowa Falls & North Western Railway Company united with Dows in an appeal as

2. SAME:  
assessment  
of damages.



to the right of way over the first-mentioned eighty acres, and upon return asked that it be substituted as sole plaintiff because the owner of the fee. The motion was denied, on the ground that an appeal may not be taken from a part of the award. There the attempt was both to sever the land and the assessment in the appeal, while here the appeal was from the entire award as made by the commissioners, and with the evident object of having the assessment as to the entire tract reduced. How this shall be accomplished, whether in rejecting elements of damages thought proper to be considered by the sheriff's jury or excluding a portion of the right of way which that body erroneously considered, or owing to a different estimate of the extent of the injury, is not material.

The issues raised on the appeal were not different than those presented to the sheriff's jury, though the estimate of the damages is to be made without reference to that appealed from. *Hahn v. Railway*, 43

3. SAME.

Iowa, 333. The vice in appellee's reasoning lies in the assumption that the appeal is from the taking of two parts of a right of way, for only one of which plaintiff might claim. As seen, nothing in the notices exacts this construction. On the contrary, these were in harmony with the proposition that he was demanding no more than he was entitled to. Nor can it be presumed that the commissioners took into consideration the right of way other than that appropriated from plaintiff's land. If they did, this, as said, was a matter appropriate for consideration on appeal. See, *Gray v. Railway*, 129 Iowa, 68.

The order of dismissal is *reversed*.

ALBIA STATE BANK, Appellant, v. GEO. S. SMITH, ZULAH H. SMITH, R. P. SMITH & SON'S CO., and W. T. GARDNER, Executor.

**Mortgages: PRIORITY OF LIENS: SUBSEQUENT PURCHASER: NOTICE.** A  
1 simple decree in favor of a creditor establishing his right to  
subject property of the debtor to his judgment, will not entitle  
him to the protection of the recording act as a subsequent pur-  
chaser, as against prior equities and unrecorded instruments; it  
is only when he buys in the property at execution sale that he  
becomes a subsequent purchaser.

**Same: DESCRIPTION: SUFFICIENCY: NOTICE.** A description of land,  
2 although not entirely clear and satisfactory in itself, which is  
sufficient, by the application of existing facts and conditions  
ascertainable on reasonable inquiry, to point out the specific tract  
intended to be described will operate to charge a purchaser with  
notice.

**Same.** Where the first and second mortgages contained similar and  
3 indefinite descriptions of the land, but the second expressly re-  
ferred to the first and was made subject thereto, the filing of a  
third mortgage for the purpose of correcting the description in  
the first made a record sufficient to charge a subsequent pur-  
chaser of the land described in the third mortgage with notice  
of the second mortgage.

*Appeal from Monroe District Court.*—HON. D. M.  
ANDERSON, Judge.

TUESDAY, FEBRUARY 16, 1909.

ACTION to foreclose mortgages as against defendants  
George S. Smith and Zulah H. Smith, his wife, and to  
have plaintiff's lien thereunder declared superior to any  
claim of defendants, R. P. Smith & Son's Company and  
W. T. Gardner, executor. The decree gave the last-named  
defendants priority as to one mortgage on account of in-

definiteness of description therein, and plaintiff appeals.—*Modified and affirmed.*

*H. H. Trimble and D. W. Bates, for appellant.*

*Perry & Perry, for appellees.*

McCLAIN, J.—The two defendants first named in the title of the case executed the mortgages foreclosure of which is asked, and the other defendants claim liens on the property covered by such mortgages superior to the lien of the plaintiff under one of them, and to avoid circuitry in description George S. Smith and his wife will be referred to as mortgagors, and the other two defendants named in the title of the action will be referred to as defendants. In 1903 the defendants recovered several judgments against the mortgagors, and in 1904 instituted their action to have a conveyance of property by mortgagors set aside, and the property subjected to the payment of their judgments, and in February, 1905, the relief prayed for was granted to them, and the lien of their judgments established as against the mortgagors and their grantee. The description of the property in this decree was as follows: "Commencing at a point on the east line of South Main Street, 148 ft. south of a point 2 rods south of the north line of the northeast quarter of the southwest quarter of Sec. 22 Twp. 72 R. 17; thence south 198 feet; thence east 17 rods; thence north 198 feet; thence west to the place of beginning." After the rendition of that decree, the present action was brought to foreclose two mortgages given on the same property by the mortgagors above referred to, the first to the Farmers' & Miners' Savings Bank of Monroe County, duly assigned to plaintiff, and the second executed to plaintiff directly with a reference making it subject to the first. It was also asked that the description in these two mortgages be

corrected so as to cover the property intended by the parties which it sufficiently appears from the pleadings was the same property which in the previous action by these defendants against the mortgagors had been declared subject to the judgments of the former. The mortgagors as defendants in the present action made default, and it is sufficiently shown by the record, and not questioned in argument, that, as between plaintiff and the mortgagors, the evidence is sufficient to warrant a reformation.

The defendants claim, however, that by their decree establishing their right to subject the property to their judgment they became purchasers in such sense as to be protected by the recording act (Code, section 2925) against the mortgage given directly to plaintiff; for while this mortgage as well as the first mortgage which plaintiff holds as assignee were recorded prior to the recovery of defendant's judgments against the mortgagors, and the defective description in the first mortgage was corrected in a substituted mortgage which was also recorded prior to the recovery of defendant's judgments, there was no such correction made as to the second mortgage. But the claim for defendants in this connection that, by recovering a decree to subject the land, they became subsequent purchasers protected under the recording act against prior equities and unrecorded instruments, is not sound. Defendants certainly acquired nothing more than a specific lien under such decree, and this lien was of no higher right certainly than that of an attaching creditor who has caused real property to be levied upon for the payment of his claim, and it is well settled that an attaching creditor is not protected under the recording act with reference to real property. Even after a levy under attachment, the prior conveyance may be recorded, or, if defective in description, may be corrected so as to defeat the lien of such attaching creditor. *Bush*

1. MORTGAGES:  
priority of  
liens: subse-  
quent pur-  
chaser: notice.

*v. Herring*, 113 Iowa, 158; *Rea v. Wilson*, 112 Iowa, 517; *Clark v. Bullard*, 66 Iowa, 747. Although it is otherwise under the recording act relating to chattel mortgages (see Code, section 2906; *Bacon v. Thompson*, 60 Iowa, 284), it has uniformly been held under the statute as to recording of instruments affecting real property that one who claims protection as a subsequent purchaser must have proceeded further than merely to levy an attachment or execution upon the property. He becomes such purchaser only when he buys in the property at execution sale. *Norton v. Williams*, 9 Iowa, 528; *Thomas v. Kennedy*, 24 Iowa, 397; *Chapman v. Coats*, 26 Iowa, 288; *Zuber v. Johnson*, 108 Iowa, 273. The cases of *Bridgman v. McKissick*, 15 Iowa, 260, and *Fordyce v. Hicks*, 76 Iowa, 41, are not in point, for they relate only to the priority of right acquired by one creditor who brings an equitable action to subject property to the lien of his judgment as against other creditors having general judgment liens without acquiring specific liens upon the property.

But on other grounds we think that defendants are without standing as against the second mortgage, even though the description therein was imperfect. The description of the premises in the first mortgage was as follows: "Commencing at a point 148 feet south of the east line of the south extension of Main Street in Albia, two rods south of where said line intersects the north line of the N. E. quarter of the S. W. quarter of section 22, township 72, range 17, thence running south 198 feet; thence east 17 rods; thence north 198 feet; thence west to the place of beginning." In the execution of the second mortgage this description in the first mortgage was substantially copied from the first, and is as follows: "Commencing at a point one hundred forty-eight (148) feet south of the east line of the south extension of Main Street in Albia, Iowa, two

2. SAME: description: sufficiency: notice.

rods south of where said line intersects the north line of the northeast quarter ( $\frac{1}{4}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of section twenty-two (22) township seventy-two (72) range seventeen (17); thence running south one hundred ninety-eight (198) feet; thence east seventeen (17) rods; thence north one hundred ninety-eight (198) feet; thence west to place of beginning, being a part of said northeast quarter of southwest quarter, section 22, township 72, range 17." Subsequently (and still prior to the recovery of defendant's judgments) a substituted mortgage was executed by the mortgagors to the first mortgagee to correct the error in the description found in said first mortgage, in which the premises were described as follows: "Commencing at a point on the east line of the south extension of Main Street, in Albia, Iowa, eleven (11) rods south of where said line intersects the north line of the northeast quarter of the southwest quarter of section twenty-two (22), township seventy-two (72), range seventeen (17); thence south along east line of said Main Street, one hundred ninety-eight (198) feet; thence east seventeen (17) rods; thence north one hundred ninety-eight (198) feet; thence west to place of beginning." No correction of the description in the second mortgage was ever made as between the parties. Plaintiff's prayer for correction of the description in the first mortgage as originally executed and in the second mortgage is substantially that such descriptions be so changed as that they shall correspond to the description in the correction of the first mortgage. As the mortgagors made no defense, the prayer for correction involves the same question as is involved in the contention that defendants secured their decree to subject the property to the payment of their judgments without sufficient notice of plaintiff's lien under the second mortgage.

There are two grounds for holding that defendants were charged with notice of the second mortgage, although

the description therein is somewhat defective and inaccurate, either of which is in itself sufficient to require a decree in favor of the plaintiffs as to the priority of the second mortgage. The first involves a consideration of the substantial sufficiency of the description given in such mortgage. The second involves the consideration of the effect on the second mortgage of the recording of the correction in the first mortgage subject to which the second mortgage was taken. When the defendants instituted their action to subject the premises in controversy to the lien of their judgments as against the grantee of the mortgagors, they were charged with notice of the record of an instrument purporting to create a lien in favor of the plaintiff on a parcel of land the description of which would seem at first sight to be indefinite because the starting point in the description was located 148 feet south of the east line of the south extension of Main Street in Albia, and it is quite apparent that a point south of a north and south line must be indefinite when the property described is bounded by that line; but it is apparent from the balance of the description that the attempt was to describe a parcel of land 198 feet long by 17 rods wide abutting on the south extension of Main Street and lying east thereof, and that for some purpose connected with this description a definite point was named, to wit, a point two rods south of where the east line of such street intersects the north line of the quarter section in which the land is described as located. Now, we think it would have been perfectly feasible for one seeking to locate this tract of land to go to the point specifically designated, and understand from the description that he should proceed 148 feet south of that point to find the starting point of the description; that is, the northwest corner of the tract described. It appears from the evidence that the mortgagors owned no other tract of land east of the street within the quarter section, and that on this tract

they were in the occupancy of a homestead. Under these circumstances, we are satisfied that the description was sufficient to put defendants upon inquiry, for it was such as to point out to them by application to the existing facts and conditions which were ascertainable on reasonable inquiry the specific tract intended. Such a description, although not entirely clear or satisfactory in itself, is enough to charge a purchaser with notice. *Pursley v. Hayes*, 22 Iowa, 11, 39; *Barney v. Miller*, 18 Iowa, 460, 466; *Sayers v. City of Lyons*, 10 Iowa, 249, 255; *Glenn v. Maloney*, 4 Iowa, 314; *Smith v. Trustees*, 89 App. Div. 475 (86 N. Y. Supp. 34). It is to be borne in mind that this is not a case where other property is described than that to which it is contended the description should be applied. It is not contended that any other parcel of land was pointed out by this description, but only that no parcel could be located thereunder. We think, on the contrary, that by reasonable inquiry suggested by the description itself the very parcel intended to be mortgaged could have been identified.

The other reason above suggested for holding defendants bound to knowledge of the lien of the second mortgage on the premises which they attempted to subject to the payment of their judgment is to

3. SAME.

our minds also conclusive. When defendants instituted their actions to subject this property, they were bound to know that there were of record three instruments by which the mortgagors had attempted to incumber a parcel of land 198 feet long by 17 rods wide lying adjacent to the east line of the south extension of Main Street, and that the parcel described in the second mortgage was the same as that described in the first, for the second mortgage expressly referred to the first, and was made subject thereto. They were also bound to know that, after the execution of the second mortgage, these same mortgagors had by a correction mortgage reformed



the description in the first mortgage so as to describe the very land which defendants were attempting to subject. However inadequate the description in the second mortgage, defendants were referred to the first mortgage, and were advised by the record that the description in the first mortgage which corresponded to that in the second was inaccurate, and that this inaccuracy had been corrected so as to make the first mortgage cover the land in controversy. Defendants were therefore put on inquiry to ascertain whether the land described in the second mortgage was the same as that in the correct description of the first or was a different tract. The slightest inquiry would have developed the fact that the intention of the parties in the second mortgage was to describe the same tract as that correctly described in the substitute for the first mortgage. A subsequent purchaser with knowledge of those facts as to which he is put on inquiry by the records is not a purchaser without notice. *Higgins v. Dennis*, 104 Iowa, 605; *Huber v. Bossart*, 70 Iowa, 718; *Aetna L. Ins. Co. v. Bishop*, 69 Iowa, 645; *Hall v. Orvis*, 35 Iowa, 366; *Mosle v. Kuhlman*, 40 Iowa, 108; *Clark v. Stout*, 32 Iowa, 213; *State v. Shaw*, 28 Iowa, 67.

The decree of the lower court so far as it declared the second mortgage—that is, the mortgage executed directly to plaintiff—to be subject to the lien of defendants under their prior decree and refusing the correction of the second mortgage as against said defendants so as to make it appear of record that it covered the land in controversy, was erroneous, and the case is remanded to the lower court for modification of the decree in accordance with this opinion, unless plaintiff elects to have entered in this court such modified decree as he is entitled to under the facts. As appellant secures the relief sought in his appeal, the costs are taxed to appellee.—*Modified and affirmed.*

## F. L. BARNES, Appellant, v. JOHN LOVE.

**Sales:** WARRANTY: INSTRUCTION. An instruction that any positive  
1 statement of fact and not of opinion as to the quality or condition of the thing sold, which naturally and fairly shows that the seller intended to bind himself to its truth and the buyer so understood and relied upon the statement, constitutes a warranty, and is not open to the objection that it makes the existence of the warranty depend upon the sellers intention to bind himself to the truth of the statement.

**Same.** Where the courts instructions in a breach of warranty suit  
2 in the sale of a horse, were all on the theory that if the animal was affected at the time of the sale with "moon blindness" she was unsound within the terms of the claimed warranty, and no other unsoundness was referred to in the evidence, a further instruction that disease of the eyes would constitute unsoundness was not necessary.

*Appeal from Mahaska District Court.*—HON. BYRON W. PRESTON, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

ACTION to recover the consideration paid in the purchase of a mare. Plaintiff alleged a warranty of soundness, breach of such warranty, and rescission on account of such breach. Defendant interposed a counterclaim for the keeping of the mare after she was returned to him in pursuance of the attempted rescission. There was a verdict against the plaintiff as to his claim, and in favor of defendant for expense of keeping, and from judgment on this verdict the plaintiff appeals.—*Affirmed.*

*David David* and *W. H. Keating*, for appellant.

*Bolton & Bolton*, for appellee.

MCCLAIN, J.—The sole question of fact involved in the case is whether the defendant warranted the mare to be sound or only warranted her sound so far as he knew. This issue was submitted to the jury, and was determined against the plaintiff by the verdict. There is no claim that the verdict is without support in the evidence, and there is nothing in the record on which the contention of the appellant that the verdict was the result of passion and prejudice and should be set aside on that ground can be sustained. The unsoundness complained of by plaintiff was that the animal was afflicted with periodic or recurrent ophthalmia, commonly known as “moon eyes,” and that this fact was not discovered by plaintiff until about a month after the purchase, when he promptly returned the animal on that account, claiming that the disease constituted a breach of oral warranty. The suggestion that our decision may become a valuable precedent as to the nature and cause of the disease of “moon blindness” in horses has not persuaded us that any such discussion is important or justified. Conceding that the animal had that disease, and that it would constitute a breach of warranty of soundness, the question remained under the evidence whether the warranty was unqualified.

As to the instructions, the chief complaint is of one in which the jury was told that “any positive statement or affirmation of fact and not of opinion as to the quality or condition of the thing sold made by the seller in the course of the negotiations, and naturally and fairly importing that he intends to bind himself to its truth, and so understood and replied upon by the buyer, constitutes a warranty.” So much of the instruction is quoted for the purpose only of showing that it is not open to the objection made by appellant that under it the defendant would not be bound

1. SALES:  
warranty:  
instruction.

by the statement made unless he intended to bind himself to its truth. The question whether the language used constitutes a warranty is not made to depend upon the intention of the plaintiff, and the criticism of the instruction is without merit.

Another instruction is criticised because the jury is not told that disease of the eyes would constitute unsoundness, and it is contended that the court erred in refusing

2. SAME. to give two instructions asked by plaintiff on this question; but the court instructed the jury throughout on the theory that, if the animal was afflicted at the time of sale with so-called "moon blindness," she was unsound within the terms of the warranty contended by plaintiff to have been given and the jury could not possibly have misunderstood the instructions in this respect. No other unsoundness than that was referred to in the evidence.

Complaint is made of each of the other instructions given, but the objections seem to be so entirely without foundation that we deem it unnecessary to discuss them. The mere reading of the instructions has satisfied us that they fairly presented to the jury all the questions necessary for their determination in reaching a verdict.

Alleged errors in the admission of evidence are recited in the argument, but without discussion, and it is unnecessary to elaborate the grounds of possible objection in order to show that they are without merit.

The judgment is *affirmed*.

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ACME FOOD COMPANY, Appellee, v. W. R. HOWERTON,  
Appellant.

**Sales: FAILURE OF CONSIDERATION: EVIDENCE.** Evidence in an action  
1 for the price of stock food that the defendant sold the first shipment which was all right but that his customers refused to buy

the second on the ground that it was worthless, and that defendant used some and found it worthless, was not sufficient to support a plea of failure of consideration.

**Pleadings:** MISJOINDER OF PARTIES: AMENDMENT. The inadvertent allegation in one count of a petition that plaintiff was a corporation when it was in fact a partnership as alleged in another count, may be corrected by amendment and when so corrected the pleading does not present a diversity of parties.

*Appeal from Mahaska District Court.*—HON. B. W. PRESTON, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

ACTION for goods ordered by the defendant and delivered by the plaintiff. There was a directed verdict for the plaintiff, and judgment thereon. Defendant appeals.—*Affirmed.*

*Liston McMillan*, for appellant.

*Irving C. Johnson*, for appellee.

EVANS, C. J.—On the 6th day of July, 1899, the defendant signed and delivered to the plaintiff a written order for Acme Food put up in various quantities, to be delivered at specified prices, amounting to a total of \$162. On October 30, 1899, he signed and delivered another order for an additional quantity at like prices, amounting to a sum total of \$450. The goods ordered were delivered to the defendant within a few days subsequent to the delivery of the order in each case. On October 8, 1900, the defendant sent a remittance of \$100, and in November 22, 1900, a further remittance of \$50. Both of these remittances were credited by the plaintiff upon the first order.

I. Plaintiff brought this action on both orders in

two separate counts, alleging a balance due on the first order, and alleging that nothing has been paid upon the second. The defendant answered by a general denial. He also alleged that the consideration for the instrument sued on had

1. SALES:  
failure of  
consideration:  
evidence.

wholly failed, and that there never was any consideration for the same. At the trial the execution and delivery of the contract and the delivery of the goods in pursuance thereof were proved without dispute. In support of his affirmative defense, the defendant testified as a witness in his own behalf. The substance of his testimony is that he sold the first "batch" to his neighbors, and that it was all right, but that they refused to buy the second batch, and said it was not worth anything. "I tried some of it on my own cattle, and found that it made them scour, and was worthless." He also testified that he fed and sold about one-third of the second batch, and kept the rest on hand for about two years, and sold it for \$50. He never made any complaint to the plaintiff until the year 1902. He offered no other testimony in support of his plea of failure of consideration. It is very clear that his own testimony did not support the plea. The written order signed by the defendant contained a conditional warranty on the part of the plaintiff. But no breach of warranty is alleged, nor is any fraud charged. The court properly directed the jury to return a verdict for the plaintiff.

II. After verdict, the defendant moved in arrest of judgment for misjoinder of parties and of causes of action. In the first count of its petition the plaintiff described itself as a partnership and set forth the names of its members. In the second count it averred itself as a corporation.

2. PLEADINGS:  
misjoinder  
of parties:  
amendment.

This latter averment, however, was corrected by an amendment filed before the trial of the case. It is the contention of the defendant that the original averment of the

second count of the petition was conclusive as to the identity of the owner of that cause of action, and that it was not the same person as the partnership described in the first count of the petition, and that the apparent diversity of parties plaintiff could not be cured by the amendment filed. There is no merit in this contention. So far as appears here, the original allegation was a mere inadvertence of the pleader, and was corrected as soon as discovered. The motion in arrest was properly overruled.

The judgment below is *affirmed*.

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In re Will of MARY DOWNS, Deceased, J. L. DOWNS ET AL., Proponents, Appellants, v. MRS. KATE BURGESS and W. S. DOWNS, Contestants.

**Will contest: APPEAL: SERVICE OF NOTICE ON CO-PARTIES.** Co-parties not  
1 joining in an appeal must be served with notice thereof, unless it is made to appear that such parties can not be prejudicially affected by a reversal; so that an appeal from a judgment setting aside a will taken by part of defendants will be dismissed for failure to serve with notice those not appealing, where it appears that those not served would take more as heirs than they would under the will; and the court will not speculate as to the possibilities by which it might be to the interest of such co-parties to sustain the will.

**Same.** Notation on the appearance docket by the clerk of the return  
2 of service of an original notice showing who of the parties have been served, and the manner and time of service, is not necessary to charge an appealing party with notice as to what parties are entitled to notice of appeal.

*Appeal from Washington District Court.*—HON. K. E. WILCOCKSON, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

IN a proceeding for probate of will, contested on grounds of undue influence and want of mental capacity,

there was a verdict for contestants, with a special finding in their favor on each ground. From judgment on such verdict the proponents appeal.—Appeal *dismissed*.

*John F. Lacey, Wilson & Wilson, Edmund D. Morrison and C. J. Wilson, for appellants.*

*Seerley & Clark and Eicher & Livingston, for appellees.*

MCCLAINE, J.—Appellee's motion to dismiss the appeal, submitted with the case, is based on the ground that the notice of appeal was not served on two parties to the proceeding who were coparties with appellants. As to this matter the facts appearing in the record are as follows: In February, 1907, an instrument purporting to be the last will of Mary Downs, deceased, and appearing to have been duly executed, was filed with the clerk of the district court of Washington County for probate. Mrs. Kate Burgess and W. S. Downs, heirs of testatrix, each filed objections to the probate of the will, and on December 24, 1908, service of the notice of their contest, addressed to J. L. Downs, Mamie Downs, Pauline Downs, Josephine Downs, Linnie D. Savage, and Grace O. Salisbury, beneficiaries under the will, was accepted by Mrs. Linnie D. Savage and Mrs. Grace O. Salisbury. So far as appears this was the first and only notice relating to the proposed probate of the will, although it is to be presumed that there was general notice thereof by publication as provided in Code, section 3284. J. L. Downs appeared by attorneys, and Pauline Downs and Josephine Downs by guardian *ad litem*, to sustain the will as against the objections made; but Mrs. Savage and Mrs. Salisbury who, with J. L. Downs, were heirs as well as legatees, made no appearance and took no part in the proceedings. It is plain that J. L. Downs, Pauline Downs, Josephine



Downs, Linnie D. Savage, and Grace O. Salisbury (no service on or appearance by Mamie Downs being shown) were coparties in the proceeding. Each was a legatee, and they therefore had apparently a common interest in sustaining the will. The judgment deprived each of any interest in the estate under the provisions of the will.

By Code, section 4111, it is provided that "A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein, and file proof thereof with the clerk of the Supreme Court." The notice of ap-

1. WILL CONTEST:  
appeal; ser-  
vice of notice  
on coparties.

Downs and the guardian *ad litem* of Pauline Downs and Josephine Downs, was addressed to the two contestants and their attorneys and the clerk of the district court, but no notice was addressed to nor served upon Mrs. Savage or Mrs. Salisbury, and the contestants, appellees, have moved in this court to have the appeal dismissed for want of service upon the parties last named. While the failure to serve coparties does not prevent this court from acquiring jurisdiction if there is a notice of appeal which is sufficient as to adverse parties, nevertheless the court will, on proper objection being made, refuse to entertain the appeal if the coparties not served might be prejudicially affected by a reversal of the judgment from which the appeal is taken. *Lippold v. Lippold*, 112 Iowa, 134; *Clayton v. Sievertsen*, 115 Iowa, 687. In the case of *Dillavou v. Dillavou*, 130 Iowa, 405, this court refused, in a proceeding for the construction of a will, to entertain an appeal taken by a part of the defendants without service of notice on a codefendant not joining in the appeal, although he was served with original notice by publication only and had entered no appearance; the judgment appealed from being such that his interest under the will would be diminished in amount and value by the success of the appellants.

Several reasons are assigned by appellant to show that the interest of Mrs. Savage and Mrs. Salisbury could not be affected prejudicially by a reversal of the judgment in this case: First, it is said that the judgment deprives them of their legacies, and therefore they would be benefited by a reversal. It must be remembered, however, that they are heirs entitled each to a one-ninth interest in the estate, and counsel for appellee concede that under the showing in the record such a share exceeds in value the legacy of each, and, as the will disposed of all the property of testatrix, the sustaining of the will means a loss of any interest as heir. But it is said that their shares as heirs would be lost to them by the probating of a prior will to which some reference is made in the record, by its terms disposing of all of testatrix's property without any provision for these heirs. We can not presume, however, that there was a prior will which would be admitted to probate with this effect. The evidence as to the prior will tends to show that it was destroyed by accident or design, and it does not appear that its due execution can be established or its contents proven with sufficient certainty to justify its probate. Finally, it is said that, after the execution of the will now under consideration, testatrix conveyed to each of these two heirs by trust deed property of the value of \$1,500, which will not be realized to them if this judgment stands, for the trust deeds may be set aside on the ground of mental incapacity of the grantor; the contention being that the same evidence which has been held sufficient to defeat this will would, in an action to set aside the trust deeds, be sufficient to show that testatrix remained of unsound mind until her death. But we can not speculate as to possibilities. The controlling fact is that, although Mrs. Savage and Mrs. Salisbury have not joined in the contest, they are, on the face of the record, interested with their coheirs, the contestants, in having the judgment refusing probate sustained,

for, so far, as has been in any way determined, they will thus be entitled to an interest in the estate as heirs of greater value and in a different right than that which they would take under the will if the judgment were reversed and on a new trial a probate thereof should be awarded. The statutory rule is that coparties not joining in an appeal must be served with notice thereof, and the exception has no application unless it is made to appear that the interest of such coparty can not be prejudicially affected by the success of the appeal. This is substantially the language of the cases which have already been cited.

Our attention is called, however, to a statutory provision requiring that, when an original notice shall be returned to the office of the clerk of the district court, he shall enter in his appearance docket "so

2. SAME.

much of the return thereon as to show who of the parties have been served therewith, and the manner and time of service." See Code, section 290. Although this section is in a chapter of the Code having no special reference to probate proceedings, we may concede for present purposes that it applies to such a notice as was served upon Mrs. Savage and Mrs. Salisbury, and it appears that the only entry with reference thereto in the docket was of the filing of such notice on January 8, 1908, without setting forth any portion of the return or acceptance of service. But the filing with the clerk of the notice showing acceptance of service made such notice and acceptance a part of the record in the case. No other method of procedure to make such notice and service a part of the record is pointed out, and by Code, section 4123, notices thus filed with the clerk are to be transmitted to the Supreme Court when required as a part of the record of the case on appeal. This court has never held or even suggested, so far as we can discover, that the entry contemplated by Code, section 290, above referred to, was necessary to charge an appealing party with notice

as to who are the parties to the case entitled to notice on his appeal. He is bound to know what the records show as to notice, service, acceptance and like matters.

The motion to dismiss the appeal must be sustained. Other motions by appellee, also submitted with the case, are overruled.

The appeal is *dismissed*.

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W. J. HUGHES, Appellee, v. THE CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY ET AL., Appellants.

**Real property: FLOODING SAME: PERMANENT AND TEMPORARY INJURY.**

- 1 Although a railway bridge and embankment may be of a permanent character, the injury caused thereby from damming the water and flooding adjacent land is not necessarily of a permanent character, but may be temporary or intermittent.

**Same.** Where the structure was not upon plaintiff's land but over

- 2 a stream passing through the same, he was in no manner required to take notice of the method of its construction; nor could he anticipate injury by reason of its insufficient capacity, but his damage occurred whenever it obstructed the flow of the stream causing it to overflow his land, and was not permanent but temporary or continuing; and he might elect to so treat it, and the recovery of damages for one or more invasions was not a bar to an action for subsequent similar injuries.

**Same: INSTRUCTION.** Where there was evidence to support the

- 3 jury's finding that plaintiff's injury was due to the obstruction of the stream by defendant's bridge and embankment, there was no occasion to instruct the jury concerning the measure of plaintiff's recovery in case it should be found that the injury was caused in whole or in part by another insufficient waterway or obstruction.

*Appeal from Lucas District Court.*—HON. D. M. ANDERSON, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

ACTION at law to recover damages. Judgment for plaintiff, and defendants appeal. The material facts are stated in the opinion.—*Affirmed*.

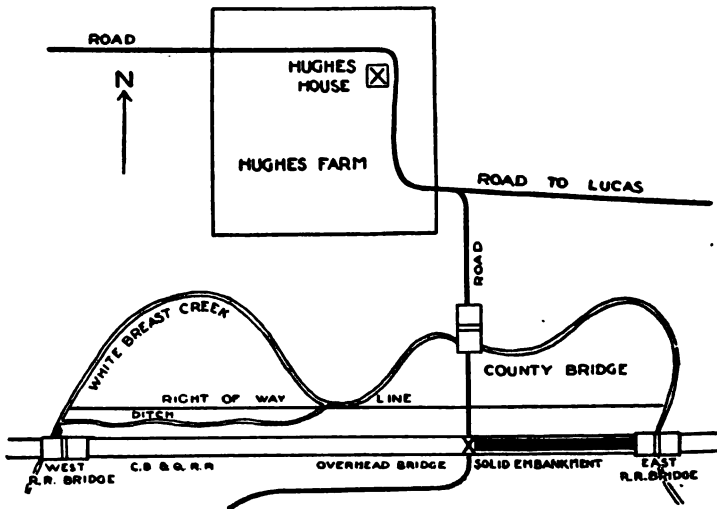
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*Stuart & Stuart*, for appellants.

*Mitchell & Hunter* and *John T. Clarkson*, for appellee.

WEAVER, J.—The plaintiff owns a farm of one hundred and sixty-five acres in Lucas County. A stream of water known as "Whitebreast creek," flowing from the southwest in a somewhat northeasterly direction, lies to the southward, and a considerable portion of the farm is bottom land adjacent to this water course. The railroad company's right of way follows substantially an east and west course along the valley or bottom lands, crossing the bends of the stream at more or less frequent intervals. The relative situation of the plaintiff's farm to this stream and to the right of way is indicated by the rough outline plat herein included:

MAPS.—Both parties used and introduced maps on the trial substantially the same as the following, which were shown to be approximately correct:



At a crossing of the creek to the southwest of plaintiff's land the company has constructed what is known in the record as the "West bridge," and again at a point slightly to the southeast of said premises what is known as the "East bridge." Between these bridges, for much of the distance, at least, the railway track is laid on a high and solid embankment, in which there is an opening for the public road, and another to allow the drainage from the south to pass under the track into a ditch running from the point marked "A" on the plat eastward to "B." As a cause of action the plaintiff alleges that defendant's east bridge, is negligently constructed and maintained, in that the opening for the passage of water thereunder is smaller and of less capacity than is afforded by the west bridge, with the result that in times of floods and freshets the waters passing under the west bridge, augmented by the additional drainage entering the stream between the bridges, is dammed or held back an unreasonable and unnecessary length of time. He further alleges that by reason of such negligence his lands were flooded during the years 1904, 1905 and 1906, destroying his crops and injuring said lands for which he demands compensation in damages. The original petition was drawn on the theory that the alleged injury to plaintiff's lands was of a permanent character, but by amendment the injury was alleged to be of a continuing or recurrent character and damages were asked accordingly.

The defendant denies the alleged negligence, and avers that said bridges were reconstructed about the year 1900, with an enlarged waterway under the same, using all reasonable care and skill to avoid obstructing the natural and proper flow of the stream, and that as so constructed said bridges and each of them do afford ample passageway for the prompt escape of all the waters flowing therein. The answer further alleges that the damage, if any, which plaintiff has sustained is chargeable to the

insufficient waterway afforded by the county bridge which spans the same stream between the two railway bridges. It further alleges that said railway bridges were not constructed by itself, but by a preceding owner of the railway, and if insufficient the injury therefrom was of a permanent character for which the party building it then became liable once for all, and the defendant as a purchaser of the road is in no manner liable therefor. For further answer it is alleged that in the year 1904 the plaintiff brought action against the defendant making substantially the same allegations of negligence as he now relies upon, and demanding damages for injuries to his farm for the years 1902, 1903 and 1904, and that on November 28, 1904, the parties made a full and final settlement by which the defendant paid the plaintiff the sum of \$400 in full satisfaction of all his claims for damages, including those for which this suit is brought. On trial to a jury there was a verdict for plaintiff for \$750, and from the judgment entered thereon defendant has appealed.

I. The first and principal contention of appellants' counsel is that if plaintiff's charge of negligence in the construction of the railway or bridge be true the injury resulting to him therefrom was of a permanent character, and having once presented a claim for damages which has been satisfied and discharged by the settlement of

1. REAL PROPERTY:  
flooding same:  
permanent  
and temporary  
injury.

November 28, 1904, no further action can be maintained. The question thus presented is a frequently recurring one, and the precedents thereon are not entirely harmonious. In this state, however, the general features of the rule are fairly well settled, though owing to variations of fact conditions there may often be room for difference of opinion as to its proper application. So far as the distinction between original and continuing injuries is involved in claims for damages on account of the negligent construction of a railway, the case now before us is clearly gov-

erned by *Harvey v. R. R. Co.*, 129 Iowa, 465, where that subject was quite thoroughly considered, and, as we are still satisfied with the conclusions there announced, it is unnecessary to here repeat the discussion of authorities. We may say, however, that counsel for appellant makes the mistake of assuming that, because the structure in question, the railway embankment and bridges, may be considered of a permanent character, the injuries resulting to the plaintiff are therefore also original and permanent. But this does not follow. Referring to this very question in the *Harvey* case, we said that the term "permanent," as here used, "has reference not alone to the character of the structure or thing which produces the alleged injury but also to the character of the injury produced by it. In other words, the structure or thing producing the injury may be as permanent and enduring as the hand of man can make it; yet if the resulting injury be temporary or intermittent, depending on future conditions which may or may not arise, the damages are continuing, and successive actions will lie for successive injuries." The same proposition is affirmed in *Troy v. R. R. Co.*, 3 Foster (N. H.) 83 (55 Am. Dec. 177); *Railway Co. v. Biggs*, 52 Ark. 240 (12 S. W. 331, 6 L. R. A. 804) and note to same case in 20 Am. St. Rep. 176.

It is to be remembered that the railway in this case is not constructed upon the land of the plaintiff. In constructing it there was no trespass upon his premises. He

2. SAME.

was not required to stand guard over the work nor take notice of the plans or methods adopted by the company in performing it. He had the right to assume that the company would exercise the proper degree of care to avoid obstructing the flow of water to his injury. If the waterway provided by the bridge was sufficient for ordinary stages of the stream as the evidence indicates it was, he sustained no injury in



fact or in law until a period of high water arrived to test its capacity. Until the delayed floods had set back across the intervening land and invaded his premises, he had no legal right to complain—no cause of action. Until then there was no certainty that he would even suffer injury from such cause. The invasion of his premises was not permanent but temporary, and each recurring invasion was a new wrong for which a new action would lie. If, when subjected to the test of use, the bridge was found to unduly obstruct the flow of flood waters, to plaintiff's injury, he had the right to assume that the railway company would remedy the defect, or, failing so to do, would make adequate compensation for such injuries, if any, as might from time to time result therefrom to him. What would have been plaintiff's right in the premises had the structure complained of been placed upon his own land without his authority or consent, or had the railway embankment or bridge operated from the first to set the water back upon his land in the form of a permanent pond or lake, we need not consider. As it was, the railway was outside the limits of his farm, no injury followed till the floods came, and without some injury he could not rightfully demand damages or maintain an action therefor. Suppose, without waiting until his land had been actually invaded and injured by high water, he had sued the railway company because of anticipated or possible injuries from such source, would counsel contend that the company's demurrer to such demand might not be sustained? To uphold such a cause of action would be to say that a farm owner, whose negligent neighbor erects an insufficient partition fence, need not wait until his crops have been destroyed by trespassing cattle before bringing action therefor, but may sue at once because of the loss which is quite sure to come some time in the indefinite future if the defects in the fence are not sooner remedied. This illustration would of course not be applicable to the case

at bar if, to use the language of Mr. Freeman (20 Am. St. Rep. 174), the construction of the bridge in question had at once upon its completion been "productive of all the damage which could ever result from it," for in such case the injurious act would have spent its force, and action would at once lie for original damages. It is an elementary proposition that negligence alone gives rise to no right of action; it is not until injury results from the negligent act or omission that damages may be recovered. It is true that where the cause of the injury is permanent, and the resultant injury is of an intermittent character, but likely to occur from time to time in the future, the party injured may elect to treat the injury as permanent, and recover all his damages in a single action. If he does so it is obvious that subsequent injuries from the same cause will give him no right to an additional recovery. If, however, he elects to treat the injury as of a temporary or continuing character, and sues for damages resulting to him from one or more specified invasions of his property, a recovery thereunder is no bar to an action for subsequent similar injuries. *Harvey v. R. R. Co.*, 129 Iowa, 476, and cases there cited. We find nothing in the facts of the present case to take it out of the rule to which this court has repeatedly given its adhesion, as indicated by the authorities cited, and we hold that the court did not err in refusing to hold that the injury of which plaintiff complains was of a permanent character, or in submitting the claim to the jury as one for continuing damages.

II. The conclusion reached in the preceding paragraph necessarily disposes of the alleged settlement adversely to the claim asserted by appellant. It appears in evidence, without dispute, that the settlement referred to was made in November, 1904, and by its express terms related solely to the damages claimed by plaintiff for injuries to lands during the years 1902 and 1903, and the

voucher made out by the railway company for payment of the sum so agreed upon states it to be for damages "for the years 1902 and 1903." Indeed, we do not understand counsel to claim anything on account of this settlement, if this theory of the permanent character of the damages suffered by the plaintiff is not sustained by us, and upon that point we uphold the position taken by the trial court.

III. Error is assigned upon the alleged failure of the trial court to properly instruct the jury concerning the measure of plaintiff's recovery in case it should be found that the injury was caused in whole or in part by the alleged inadequate waterway afforded by the county bridge, or by hedge-rows or driftwood or other causes than the negligence of the defendant. On this point it is sufficient to say that the jury specially found and returned that the flooding of plaintiff's land was caused by the railway bridge and embankment, and not by any of the other suggested possible obstructions. There was evidence on which these findings could properly be based, and, in view of such finding, the jury had no occasion to consider what might have been the measure of amount of plaintiff's recovery under a state of facts which it found did not exist.

Other questions argued are all general, governed by the conclusion already announced. The judgment of the district court is *affirmed*.

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ELI ALLEN, Appellee, v. B. URDANGEN, Appellant.

**Exclusion of evidence: PREJUDICE.** Where the answer of a witness on cross-examination was confusing and his redirect examination did not clear the confusion, its exclusion as leading and suggestive was not prejudicial, especially as no further attempt to examine the witness on the subject was made.

**Same.** Where defendant in a suit for wages testified to a special  
2 contract at a certain price per day and that he had paid plaintiff at that rate for all the days he had worked, which was admitted, there was no prejudice in excluding the further inquiry as to whether defendant had paid him in full for his services, as the subject had already been fully covered.

**Action for services: *Quantum meruit*:** EVIDENCE. In a suit on  
3 *quantum meruit* for services a witness may testify to the reasonable value of the services he saw plaintiff perform, and to the going wage at the time and place for similar labor.

**Same.** Evidence reviewed and held to sustain a verdict for plaintiff  
4 in a suit for the reasonable value for services, as against the contention of defendant that the work was performed under an express agreement as to *per diem*.

*Appeal from Poweshiek District Court.*—HON. K. E. WILCOCKSON, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

THIS is an action on *quantum meruit* for balance due for the value of services rendered by plaintiff to defendant. The defendant admits the rendition of services, but avers that the same were rendered in pursuance of an express agreement that they should be paid for at the rate of \$1 per day, and that the amount so agreed upon was so paid in full by the defendant to the plaintiff from time to time as the services were rendered. There was a trial before a jury. Verdict and judgment for the plaintiff. Defendant appeals.—*Affirmed*.

*J. H. Patton*, for appellant.

*Boyd & Bray*, for appellee.

EVANS, C. J.—In April, 1906, the plaintiff entered into the employment of the defendant for the performance of common labor, of a miscellaneous character. Shortly prior to this time the plaintiff had been in the employ-

ment of the defendant at an agreed wage of \$1 per day. It is claimed by the plaintiff that at the time of the latter employment the defendant said to him that he would pay him as good wages as he could get anywhere, and that there was nothing else said on the subject of wages. The defendant contends that the plaintiff came to him to seek work, and offered to work for \$1 per day, and that the defendant accepted the offer and set him to work. The plaintiff worked under this employment with more or less regularity until about February 19, 1907. At the end of each week, usually, he presented to the defendant a statement of his time, and received pay therefor from the defendant at the rate of \$1 per day. The defendant alleged an oral agreement for an express wage, and denied that the value of plaintiff's services was greater than \$1 per day. The case is presented to us on this appeal upon four assignments of error, and we will consider them in the order of presentation by the appellant.

I. William Vogt, a witness for defendant, testified in detail to a conversation had between himself and the plaintiff while the plaintiff was in defendant's employment. He testified that as a part of this conversation the plaintiff said to him that he was receiving as wages \$1 per day. On cross-examination the following occurred:

1. EXCLUSION  
OF EVIDENCE:  
- prejudice.

"A. Well, he was saying that he was working for Mr. Urdangen. Q. Was that all he said? A. Why, yes, sir." Redirect examination: "Q. Now, Mr. Vogt, he asked you if that was all that was said, that he was working for Mr. Urdangen. Do you want to be understood that that was all the conversation that was had, or do you want to be understood that the conversation was had as you testified first? A. Yes, sir. (Objected to as leading and suggestive, and putting words in the witness' mouth. Sustained.)" The appellant complains of this ruling. Whether right or wrong, he was in no manner hurt by it.

The question could very properly have been permitted by the court under the circumstances. There was some apparent confusion as to what the witness meant by his answer on cross-examination; but his answer on the redirect examination did not clear the confusion to any extent. The question being in the alternative, an affirmative answer could not be other than ambiguous. Appellant's counsel did not attempt to question the witness further on the subject. This he could have done, notwithstanding the ruling of the court. Appellant has therefore no ground of complaint at this point.

II. The defendant testified as a witness in his own behalf. His counsel put to him the following question:

"Q. Do you know as a matter of fact whether or not

2. SAME. you have paid him in full for all the services and all the days he worked for you?

(Objected to as asking for the conclusion of the witness. Sustained.)" The refusal of the court to permit this question could work no possible prejudice to the defendant. He had testified fully to the fact of paying the plaintiff \$1 per day for all the time he had worked for him. He had also testified to the alleged oral agreement that \$1 a day was to be the wage. The plaintiff conceded that he had received \$1 per day. The defendant did not claim to have paid him any more. There was therefore nothing left to be covered by the question under consideration, and the court properly excluded it.

III. August Schrader was a witness for the defendant. He had worked for the defendant as a co-employee of the plaintiff for a number of days, and testified specifically as to the kind of work done by each.

3. ACTION FOR  
SERVICES:  
quantum mer-  
uit. evidence.

He had also described the physical condition of the plaintiff, as he saw it. The following questions put to this witness by defendant's counsel were ruled out by the court upon objection of plaintiff: "Q. From your observation of his labor for Mr.

Urdangen do you know what the labor you saw him performing was reasonably worth? Q. Do you know what the going wage in Grinnell for common labor was say from April, 1906, until February, 1907? Q. During that time, did Mr. Allen perform the labor of an able-bodied man? Q. At that time was Mr. Allen able to do such work as carrying up the sheeting and things of that kind?" The first and second of the foregoing questions were entirely proper, and could have been permitted. It should be said, however, that the witness had previously answered similar questions in the negative. He afterwards answered similar questions in the affirmative, and was permitted to testify that plaintiff's labor was reasonably worth \$1 per day. The ruling, therefore, worked no prejudice to the defendant. The objections to the third and fourth questions were properly sustained. If they had been answered by the witness in the negative, they would have added nothing to the witness' previous testimony except his mere conclusion.

IV. The fourth point urged by the appellant is that the verdict is contrary to the evidence, and to this point appellant's counsel devotes his principal argument. This question has given us no little trouble. The

4. SAME.

contention of the defendant as to an oral agreement for an express wage of \$1 is very strongly corroborated by many undisputed facts of the case, and by much of the testimony of the plaintiff himself. That the plaintiff presented to the defendant at the end of each week (with one or two exceptions, in the absence of the defendant) a statement of his time and received pay therefor at \$1 per day is undisputed. That plaintiff's last services consisted of three days in the month of February, for which he presented his statement about a week later and received of the defendant \$3, without objection on his part, is conceded. The plaintiff was sixty-eight years of age, and more or less crippled, and walked with a cane.

He was always able, however, to lay aside his cane to do his work. That he could not do very heavy work was practically conceded by him. On the other hand, it was conceded by the defendant that he was a very efficient and reliable workman to the extent of his physical ability. The earning power of the plaintiff was a proper circumstance to be considered on the question whether he did really agree to work for \$1 a day; it being shown by many witnesses that the reasonable wage of an average man was \$2 per day. The fact that the plaintiff presented to the defendant a statement of his time weekly and received from him payment at the rate of \$1 per day is quite inconsistent with plaintiff's present position, if unexplained. The explanation offered by plaintiff is that at or about the time defendant commenced to make payment at that rate he said he would make everything right with him later. While such an explanation is easily made, it is not wholly unreasonable. The work to be done by the plaintiff was varied in character. Some of it was slight and some of it was quite difficult and laborious. Undoubtedly the real value of such service could be determined after it was performed, better than before if the parties were willing to leave the question open. To our minds the weight of evidence is with the defendant, but we can not say that it so preponderates as to justify us in overruling the verdict of the jury and the action of the trial court in approving same. No exception is taken to the instructions of the trial court. On the whole record we see no ground on which we can properly interfere.

Judgment below is therefore *affirmed*.



RHODA McDOWELL, Appellee, v. P. A. McDOWELL,  
Appellant.

**Descent and distribution of estates: RIGHTS OF HEIRS: ESTOPPEL.**

As a general rule property rights created by estoppel are superior to the statute of frauds and the statutory provisions with reference to wills and conveyances of real and personal property; so that where a decedent having no issue called his wife and mother to his bedside just prior to his death and stated to them that he desired his wife to have all his property, to which the mother consented, and he therefore made no will or formal transfer of the property, the mother was estopped to claim any interest in the property under the statutes of descent.

*Appeal from Lucas District Court.*—HON. FRANK W.  
EICHELBERGER, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

THIS is an action to establish and quiet title to certain real and personal property of which G. J. McDowell, the husband of the plaintiff, died seised. Defendant denied plaintiff's title, and in a counterclaim asked that her title to an undivided one-half of the property be established. The trial court granted plaintiff the relief prayed, and defendant appeals.—*Affirmed.*

W. W. Bulman, for appellant.

Hickman & Wells, J. A. Penick, and Stuart, Stuart & Stuart, for appellee.

DEEMER, J.—Plaintiff is the widow, and defendant the mother, of G. J. McDowell, who died intestate and

without issue December 20, 1906, seised and possessed of the real and personal estate in controversy. For appellee it is contended that while deceased was lying on his death-bed, and fully comprehended that dissolution was near, plaintiff and defendant came to the bedside, and that he then, which was within a few hours of his death, stated in the presence of both of them that he desired his wife, plaintiff herein, to have all his property and to keep it, which she said she would do, and that he then turned to defendant, his mother, and asked her if that was all right, to which she responded: "Yes, Jack, it is. I don't want a cent you have got. You and Rhoda have worked hard for what you have got, and I don't want it. She can have it." With this he expressed satisfaction, and it is claimed that in consequence he made no will or other conveyance to plaintiff. These facts, somewhat elaborated in the testimony, are relied upon as being sufficient foundation for plaintiff's claim to the entire property left by her husband. The trial court found that defendant was estopped from claiming any interest in or to the property left by the deceased, and quieted the title thereto in plaintiff, and it is from this decree that the appeal is taken.

Defendant argues the case as if plaintiff were relying upon an oral will made by deceased during his lifetime, but that is not her position. She is claiming the property as the widow of the deceased and pleads as against defendant, the mother of the deceased, an estoppel, based upon her statements and conduct just prior to the demise of G. J. McDowell. While there is a conflict in the testimony regarding a conversation which took place between the deceased, his mother, and his wife just prior to his decease, we think the preponderance thereof shows that deceased intended that his wife should have all of his property; that when he realized death was at hand, and within three or four hours of the time it

occurred, he stated to his wife and his mother that it was his desire that his wife should have it all, and at the same time asked his mother if this was satisfactory to her, to which she responded in language substantially as indicated above; all parties having agreed that nothing further was done by deceased in the way of making a will or deed, and that shortly thereafter he died in the belief that his wife would take all his estate. Following our usual custom, we do not set out the testimony upon which we base these conclusions, as to do so would serve no useful purpose. The fact question being settled, the only remaining one is of law, and that is, will these facts constitute such an estoppel upon defendant as will deprive her of her right to take under the law as mother of the deceased, who left no children surviving?

The better procedure, of course, to have been pursued by the deceased was to have made a deed and bill of sale of his property, running directly to his wife, or, better still, he could easily have made a will. But he did neither, and the ultimate question here is, may an heir or successor in interest to a decedent's property so conduct himself as that he will be barred from claiming any interest therein? Unless our statutes of descent are to be regarded as absolute and as inflexible as the laws of the Medes and Persians, the facts recited should estop the defendant from claiming any interest in her son's estate. And the ultimate question in the case is, may one be estopped by declarations or conduct from claiming under the statutes of descent? The general rule announced by the decisions is that a property right, created in favor of one by an estoppel, is superior to the statute of frauds and the statutory provisions with reference to the execution of wills and conveyances of real estate and personal property. Cooley on Torts (2d Ed.) latter part section 569. As supporting this rule, see *Dowd v. Tucker*, 41 Conn. 197;

*Judd v. Mosely*, 30 Iowa, 423; *Burden v. Sheridan*, 36 Iowa, 125.

No case to which our attention has been called is exactly in point, although the *Dowd* case, *supra*, is like it in principle. There was a statement by testator that he wished and intended a particular person to have his property, or a part thereof, and a devisee under the testator's will, who would take if the will were not changed, was informed of this desire, and consented that the party named should have it. On the strength of the promise testator did not change his will by codicil, as he might have done, and died leaving his original will unchanged. The Connecticut court on this state of facts held that the devisee under the will was a trustee for the benefit of the person to whom the testator wished to give the property, and ordered the devisee to make a conveyance thereof to the party to whom the testator intended the property to go. This case seems to announce the correct doctrine. The deceased was induced not to make a will or deed on the strength of defendant's assurance that plaintiff was to have all the property. On the faith of the agreement he permitted a title to one-half of the property to vest under the statutes of descent in his mother. After his death the mother asserts title absolute to one-half of the property under the statutes of descent. Under such circumstances it is not difficult to find a trust, either expressed or implied, either in virtue of the promise, or by reason of the fact that to allow defendant to disregard it would constitute a fraud upon plaintiff, and thus create a constructive trust for her benefit. Whether this be worked out by estoppel, or upon the theory of a trust, is entirely immaterial.

Appellant's counsel do not seriously contend that such an arrangement as is claimed by plaintiff may not be enforced in equity, but she insists that no such arrangement was made, and that whatever the agreement, it did not

contemplate anything more than that the deceased might make a deed or will transferring or devising the property to the plaintiff, which he never did. In this connection it must be remembered that the conversation between the parties occurred but a few hours—less than four—before his death. Indeed, under the most favorable aspect of the case, there were not to exceed two or three hours within which deceased could have made a will or conveyance. True he might have done so during this interval had he thought it advisable, and the very fact that he did not do so is indicative of his reliance upon defendant's assurance that she would not assert any claim to his property, and that, his (testator's) wife should have it all. This, as we have said, makes out a very clear case of estoppel. The foundation of this doctrine is equity and good conscience. And its object is to prevent the unconscientious and inequitable assertion and enforcement of claims or rights which might have existed or been enforced by other rules of law unless prevented by estoppel. In practical effect there is, from motives of equity and fair dealing, the creation and vesting of opposing rights in favor of the party who gets the benefit of the estoppel. *Horn v. Cole*, 51 N. H. 287 (12 Am. Rep. 111). See, also, 2 Pomeroy's Equity Jurisprudence, 1417. We are abundantly satisfied from a perusal of this record that the trial court correctly found that defendant is estopped from claiming any title to the property, and that plaintiff's title thereto should be quieted.

The decree is therefore *affirmed*.

J. N. PATTERSON and B. E. JONES, Appellants, v. CITY  
OF BURLINGTON ET AL.

**Municipal corporations: STREET IMPROVEMENT: INJUNCTION BY TAX**  
1 PAYER. A resident tax payer of a city, whose property is unaffected by the improvement of a street and the building of a retaining wall, can not enjoin the city from making the improvement on the ground that it is being done in part for the benefit of a street car company by construction of the wall outside the street line, where the same appears to be reasonable and proper for public use, and the street car company is contributing to the expense so that the cost to the city will be less than otherwise.

**Same: ACQUISITION OF ADDITIONAL LAND FOR STREETS: IRREVOCABLE**  
2 LICENSE. Where written permission has been given the city by the owner of ground adjoining a street to erect a retaining wall thereon for the improvement of the street, and the city has acted thereon, it has acquired the same right to construct and perpetually maintain the wall as though it had purchased or condemned the ground.

*Appeal from Des Moines District Court.*—HON. W. S.  
WITHROW, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

ACTION to restrain defendant from constructing a retaining wall along or near the east side of South Main Street, in said city, the complaint being that the proposed wall departs from the east side of the street, and is to be constructed on land not belonging to the city. After the hearing upon the merits, the court on defendant's motion dismissed plaintiffs' petition, and the plaintiffs appeal.—*Affirmed.*

A. M. Antrobus, for appellants.

*E. L. Hirsch and Seerley & Clark, for appellees.*

McCLAIN, J.—Plaintiffs sue as residents and taxpayers of defendant city, but not as owners of any property to be taken or interfered with or in any way damaged by the proposed action of the city which they seek to have restrained. As the evidence shows that the proposed improvement constructed as planned by the city will cost less than it would cost to build a retaining wall along the east side of the street and fill the street to grade against this retaining wall, and that the improvement as proposed will widen, instead of narrow, the street as would a retaining wall built within the street limits, we can not see that plaintiffs as taxpayers have any ground of complaint which justifies them in seeking to interfere with the discretion of the city council in the improvement of this street.

The real grievance seems to be that the city council is causing the retaining wall to be built and the street brought to grade for the accommodation of a street car company desiring to put in a loop near the entrance to a park in order to better accommodate the public resorting to such park; but it appears that the improvement of the street itself is reasonable and proper for the public use, and that, by an arrangement with the street car company to do the filling without expense to the city, the total cost of the improvement will be less than it would be if the retaining wall were constructed along the line of the street and within the street limits. Owing to the configuration of the ground, the proposed retaining wall so far as it departs from the line of the street is shorter than would be necessary if it were built on the street line.

1. MUNICIPAL  
CORPORATIONS:  
street improve-  
ment; injunc-  
tion by tax-  
payer.

With reference to the claim that the council has no right to expend money in the construction of a wall on

property to which the city does not have title, it is enough to say that the statute contemplates the acquisition by purchase or condemnation proceedings of additional land adjoining a street upon which to construct a retaining wall. See Code, section 784; *Talcott Bros.*

2. SAME: acquisition of additional land for streets: irrevocable license.

*v. Des Moines*, 134 Iowa, 113. It appears that, before the council passed a resolution providing for the proposed improvement, the abutting landowner upon whose property the wall was to be constructed in writing granted to the city permission to build the retaining wall on his property as proposed, and this permission was presented to and accepted by the council, so that the city constructing the wall will do so under a license from the abutting owner which when acted upon by the city will be irrevocable, and will confer upon the city the right to maintain said wall in perpetuity as completely as though the right had been secured by condemnation proceedings.

We are unable to discover any equitable grounds on which the plaintiffs are entitled to have the city enjoined from making the proposed improvement, and the decree of the lower court is *affirmed*.

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J. L. JONES ET AL., Trustees of Yellow Spring Township,  
Des Moines County, Iowa, Appellants, v. JOHN W.  
THIE, Appellee.

**Highways: HEDGE FENCES: TRIMMING: ACTION TO ENFORCE SAME:**

I PLEADING AND PROOF. The statute requiring the trimming of hedge fences along public highways directs the road supervisor to see that it is enforced, except where the one district system for the township has been adopted and then the duty devolves upon the trustees; but where the trustees may maintain an action to compel the trimming of a hedge by the landowner, which is not conceded, they must allege and prove the adoption of the one district system.



**Same: NUISANCE: EVIDENCE.** Conceding that township trustees in 2 their official capacity may maintain an action to require the trimming of highway hedges, on the ground that they are a public nuisance, the evidence on that question in the instant case is sufficient to support an adverse finding, and the judgment will not therefore be disturbed on appeal.

*Appeal from Des Moines District Court.*—HON. JAMES D. SMYTH, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

THIS is a suit in equity by the plaintiffs as trustees of Yellow Spring township, Des Moines County, Iowa. The relief prayed for is a mandatory injunction. Decree for defendant. Plaintiffs appeal.—*Affirmed.*

*Power & Power*, for appellants.

*Seerley & Clark*, for appellee.

EVANS, C. J.—The plaintiffs are township trustees. They purport to bring this action in their official capacity. The defendant is the owner of a farm which abuts on the south line of an east and west highway in the township. Near the north line the defendant maintains an osage orange hedge, which runs parallel with the highway at a distance of from five to seven feet south of its south line. The purpose of this action on the part of the plaintiffs is to compel obedience on the part of the defendant to the provisions of section 1570 of the Code Supplement of 1902, which is as follows: "Sec. 1570. Owner of osage orange . . . or any other hedge fence along a public road shall keep the same trimmed by cutting back within five feet of the ground at least once in two years when so ordered by the trustees of their respective townships . . . Upon a failure to comply with the foregoing

provision the road supervisor shall immediately serve a notice in writing upon the owner of the hedge to trim the same, and if he fails to do so for sixty days thereafter, said supervisor shall cause the same to be done. . . . Where the one district system is adopted . . . it shall be the duty of the township trustees to enforce the foregoing provision." The contention of the plaintiffs is that the defendant has failed to trim his hedge as required by this statute, notwithstanding that they served written notice upon him sixty days before the commencement of this suit. The contention of the defendant is that the plaintiffs are not entitled to maintain this action in any event. He further contends that his hedge is not a fence within the meaning of the statute; that it is not sufficiently dense for that purpose; that it consists of stems which are several feet apart in most places; and that it is not upon the line of the highway. He especially urges that there is neither allegation nor proof on the part of the plaintiffs that the "one district system" is adopted in the township, and that they have no duty to perform in the enforcement of such statute.

I. It will be observed from the statute quoted that the duty of enforcing its provisions is laid primarily upon the road supervisor. No duty of enforcement is imposed upon the township trustees, except where the one district system is adopted. We see no escape from the conclusion that it was incumbent upon the plaintiffs to plead and prove that such system was adopted in that township. It is urged by the plaintiffs that such fact appears by fair inference in their petition, and that, in the absence of attack thereon, the court ought to put such a construction upon it. If we should concede the claim urged, it would not cure the absence of evidence on the question. It is also urged by counsel that the case was tried in the court below on the theory that no

1. HIGHWAYS:  
hedge fences:  
trimming: ac-  
tion to en-  
force same:  
pleading and  
proof.

proof was necessary on that question, and that the same theory should be adopted here. We have heretofore gone to some length in this direction in support of the judgment of the lower court. We would not, however, be warranted in assuming facts not proved for the purpose of reversing a judgment of the lower court. We must hold that the plaintiffs have failed to show that any duty has been imposed upon them to enforce the provisions of the statute in the case at bar. We may say, further, that we know no rule that will warrant the township trustees as such to maintain an action for a mandatory injunction in such a case.

II. The plaintiffs have incorporated in their petition a second count, wherein they charge that the hedge as maintained by the defendant is an obstruction of the high-

way and constitutes a public nuisance as such, and they ask that the same be abated.

2. SAME:  
nuisance:  
evidence.

Without holding that plaintiffs occupy any better standing on this count than on the first, we may say that the evidence on this feature of the case is more or less conflicting. It is doubtful whether any of the evidence shows an obstruction of the highway within the meaning of the nuisance statute. In any event, the lower court was warranted in finding adversely to the plaintiffs on the evidence. We may say in this connection, also, that the plaintiffs seem to ask equitable relief on this count solely by virtue of their official capacity. They do not bring the action as private individuals suffering some special damage from the alleged nuisance distinct from damage suffered by the general public. No authorities are brought to our attention which support such a proceeding, and it may well be doubted whether it can be maintained at all. In any event, the adverse finding of the lower court is supported by the evidence. The judgment below is *affirmed*.

THE STATE OF IOWA, Appellee, v. W. G. CLARK,  
Appellant.

**Grand jurors: MEMBER OF ELECTION BOARD: DISQUALIFICATION.** Membership of an election board does not disqualify one from serving as a grand juror, and the mere fact that the name of one of the judges of election was returned by the board of which he was a member affords no proof that the same was done at his solicitation.

**Grand jury: DRAWING OF PANEL: IMMATERIAL ERROR.** A slight deviation from the statute as to the number of names required for a grand jury list from which the panel is drawn is not a material error.

**False pretense: INDICTMENT: DESCRIPTION OF PERSON DEFRAUDED.** In charging a crime all the facts which are necessary to constitute a complete offense must be stated, so that the accused may be advised of the nature of the case it is proposed to make against him; and in charging the crime of obtaining money or property by false pretense the name of the party whose property rights have been invaded must be expressly averred and not left to inference. The indictment in the instant case is held defective in this respect.

**False pretense: EVIDENCE.** The record of an unsatisfied mortgage is not sufficient to disprove the truthfulness of a grantor's representation that the land was unincumbered by mortgage liens; and where there was no other evidence than that of the county recorder that the original instrument was not in his possession or under his control, there was no proper foundation for admission of the record as secondary evidence of the fact that the mortgage was unsatisfied, even if competent.

*Appeal from Jefferson District Court.*—HON. D. M.  
ANDERSON, Judge.

WEDNESDAY, FEBURARY 17, 1909.

INDICTMENT for cheating by false pretenses. Trial

to a jury, and verdict of guilty. Motion for a new trial overruled, and from the judgment entered on the verdict the defendant has appealed.—*Reversed and remanded* for a new trial.

*Claude R. Porter and Crail & Crail*, for appellant.

*H. W. Byers*, Attorney General, and *C. W. Lyon*, Assistant Attorney General, for the State.

WEAVER, J.—1. The appellant moved to set aside the indictment because of the alleged disqualification of three grand jurors upon the panel from which was drawn the grand jury by which the indictment was returned. The statute (Code Supp. 1907, section 337) makes it the duty of election boards to certify that the jury lists returned by them do not contain the name of any person who directly or indirectly requested to be included therein. It is shown in the record that upon the full panel of grand jurors drawn for the year in question were three persons each of whom had served upon an election board which returned names for the grand jury list, though no two of them served in the same precinct. One of these persons was a member of the grand jury which returned this indictment. It is argued that the fact that the name of a member of an election board appears upon a jury list is conclusive evidence that it was so returned by his direct or indirect request, and that such fact goes to the legal integrity of the panel, and invalidates the indictment. But the argument is unsound. As already noted no two of these grand jurors were members of the same election board. These boards are composed of at least three members, and the mere fact that the name of one of them appears in the list returned affords no proof that the person so designated was placed therein at his request. This we

have already held in a late case. See *State v. Anderson*, 140 Iowa, 445. Membership of the election board is not a disqualification for jury service. The purpose of the statute referred to is to keep the jury lists free from the presence of those who solicit or seek places thereon. The burden is upon the objector to show the fact of such solicitation or seeking. There is no evidence of such fact in this case, and the presumption is that the lists were properly made, and the certification that they contain no such names is true and correct.

It is further sought to set aside the indictment because the grand jury list from which the panel was drawn contained but seventy-three names instead of seventy-five

2. GRAND JURY:  
drawing of  
panel: imma-  
terial error.

as required by law. This court is already committed to the doctrine that such slight deviations from the statutory methods of selecting a grand jury involve no material error. See, precisely in point, *State v. Carney*, 20 Iowa, 82; *State v. Brandt*, 41 Iowa, 602. The motion to set aside the indictment was therefore properly overruled.

II. The appellant also demurred to the indictment because of its alleged failure to state the name of the owner of the property which is alleged to have been obtained by false pretenses, and does not state facts constituting an offense against the laws of this State. This demurrer was overruled, and error is predicated on such ruling. The material portion of the indictment is in the following language:

3. FALSE PRE-  
TENSE: indict-  
ment: descrip-  
tion of per-  
son defrauded.

The said W. G. Clark on the 9th day of November, A. D. 1904, in the county of Appanoose and State of Iowa, did then and there unlawfully, willfully, feloniously, designedly and with intent to defraud one Ella Close, represent and pretend to said Ella Close, he, the said W. G. Clark, was the owner of certain property in Center-ville, Iowa, to wit, lot nineteen (19) in Clark & Peatman's

addition to the city of Centerville, Iowa, and that said property was free from all incumbrances of every kind, and then and there offered to convey to said Ella Close said property above described on payment to said W. G. Clark of a certain sum of money, to wit, nine hundred and fifty dollars, by good and sufficient warranty deed, and relying on said representation, and in pursuance of said offer, the said Ella Close was then and there induced to pay to the said W. G. Clark the sum of nine hundred and fifty dollars in payment for the purchase of said property. Whereas, in truth and in fact, said land above described was not clear and free from all incumbrances, and the said W. G. Clark did not have a clear title to said land, there being at the time a mortgage in existence covering and including said property above described, said mortgage being for the sum of five hundred dollars and given by one C. J. Miller to one John Galbraith. And the said W. G. Clark falsely and fraudulently made said representations to said Ella Close, designedly and with intent to defraud, then and there knowing said representations to be false, and for the purpose of procuring from said Ella Close nine hundred and fifty dollars as aforesaid. And the said Ella Close believed said representations and pretenses so made to be true, and relied thereon, and was induced to deliver to said W. G. Clark said nine hundred and fifty dollars as above mentioned, and said Ella Close was thereby defrauded, contrary to law, and in such case made and provided and against the peace and dignity of the State of Iowa.

These allegations we think are open to the objection made by the appellant. While under our statutes and practice mere matters of form are not insisted upon with the strictness which marked the common law, there has not been, nor can there safely be, any relaxation of the rules which require a legal accusation of crime to state with clearness and certainty all the facts necessary to constitute a complete offense, and disclose to the accused the nature of the case which the State proposes to make against him. The substance of the alleged crime—that is, the facts which are necessary to constitute a complete

offense—must still be stated with certainty and precision. Our statute expressly provides that an indictment “must contain a statement of the facts constituting the offense” (Code, section 5280), and must be direct and certain as to the particular circumstances of the offense when they are necessary to constitute a complete offense. Code, section 5282.

There are crimes which may be committed by the accused in the secrecy and solitude of his room which do not directly or immediately affect any other person, and to charge such a crime it is ordinarily necessary to do no more than to charge the doing of the act and the unlawful or felonious intent. For example, the accused may be charged with the unlawful possession of burglar’s tools, under Code, section 4790; he may adulterate food with intent to sell the same in violation of Code, section 4982; or may keep intoxicating liquors with intent to sell in violation of the prohibitory law, and a charge of an offense of this class may be made without alleging the purpose of the accused to injure any particular person. But by far the larger class of public offenses are not of this character. In most instances the offense against the State is complete only as the wrongful act operates upon or affects some third person. For example, there can be no assault without a person assaulted, no bribery without a person bribed, no unlawful sale without a purchaser, and no unlawful loaning of public moneys without a borrower, no larceny without trespass upon the property rights of another. *State v. Allen*, 32 Iowa, 248; *State v. Brandt*, 41 Iowa, 593; *State v. Jackson*, 128 Iowa, 543. It follows of necessity that in such cases the statement of the name of the third person without whom the crime can not be committed is essential to the statement of a complete offense, and an indictment which omits to state such name is demurrable. *Buckley v. State*, 2 G. Greene, 162; *State v. McConkey*, 20 Iowa, 574; *State v. Allen*, *supra*;



*People v. Minnock*, 52 Mich. 628 (18 N. W. 390); *State v. Murptry*, 17 R. I. 698 (24 Atl. 473, 16 L. R. A. 550); *State v. Brandt*, *supra*.

It would seem to require no argument to show that the crime of obtaining money or property by false pretenses is of the latter class. The offense which the statute creates can be committed only by obtaining money, goods, or property belonging to another by means of some false pretense or false token, Code, section 5041. To charge the crime, it is therefore necessary to state the name of the person whose property rights have been thus trespassed upon. This principle has been often affirmed and reaffirmed by the authorities—just as in cases of robbery and larceny. Indeed, these three crimes—robbery, larceny, and obtaining property by false pretenses—have many essential elements in common. In each the gist of the offense is the felonious taking and conversion of the property of another; the difference between them relating solely to the means by which such taking and conversion are accomplished. In neither can there be any completed offense except as the property of some other individual is in fact obtained, and the name of such individual is descriptive of the offense, and must therefore be averred in stating the accusation. This was our holding in the comparatively recent case of *State v. Jackson*, 128 Iowa, 543. The rule thus approved finds sufficient support in *Leobold v. State*, 33 Ind. 484; *Washington v. State*, 41 Tex. 583; *People v. Krummer*, 4 Parker, Cr. R. (N. Y.) 217; *Thompson v. People*, 24 Ill. 66 (76 Am. Dec. 733); *State v. Wasson*, 126 Iowa, 320; *State v. Lathrop*, 15 Vt. 279; *Jones v. State*, 22 Fla. 532; *Moulie v. State*, 37 Fla. 321 (20 South. 554); *Halley v. State*, 43 Ind. 509; *Thompson v. People*, 24 Ill. 60 (76 Am. Dec. 733); *State v. Blizzard*, 70 Md. 385 (17 Atl. 270, 14 Am. St. Rep. 366); *State v. Smith*, 8 Blackf. (Ind.) 489.

The Attorney General, in argument, concedes the

rule above stated to be the law of this State, and further concedes that the indictment before us contains no specific allegation of the ownership of the money alleged to have been obtained by the appellant, but insists that the language actually employed is the equivalent of such specific allegation. But this can not be allowed. It is one of the most elementary rules of criminal pleading that in construing a charge of crime nothing is to be taken by intendment, nor can the lack of material averments in the indictment be supplied by mere matters of recitation or by inference from other statements. True, it is alleged that by means of the false representations Ella Close was induced to pay over to the appellant a certain sum of money; but it nowhere states whose money was thus paid or delivered, nor can we find that meaning in any of the language employed except as a matter of mere inference. *Sill v. Regina*, 16 Eng. L. & Eq. 375. That ownership is a material fact which must be expressly averred and not left to inference, see *Moulie v. State*, 37 Fla. 321 (20 South. 554). The demurrer should have been sustained.

III. To support its case the state offered, and the court over defendant's objection admitted, testimony to the effect that in some five or six other instances, during the period from the year 1903 to 1905, the appellant had sold one or more town lots to other purchasers, representing them to be free from incumbrance, and that in each instance it was afterwards discovered that the property was incumbered by mortgage. In each instance the prosecutor having proved the representation disputed its truth by putting the county recorder upon the stand, and after showing that such officer did not have possession of the mortgage constituting the alleged incumbrance had him identify certain pages of the books of his office showing the record of a mortgage upon the property in question which had

4. FALSE PRE-  
TENSE:  
evidence.

never been discharged of record. To each of these offers the appellant objected, on the ground that the evidence presented was incompetent and secondary, and that no foundation had been laid for its admission. The overruling of these objections is assigned for error. We are disposed to hold that under well-settled rules this evidence should have been excluded. The only foundation laid by the State in each instance was the statement of the recorder that he did not have the original instrument in his possession or under his control, and this we think was entirely insufficient. So far as the record shows each and every person holding mortgage incumbrances, if any, on these lots was within reach of a subpoena, and the best evidence of the existence of such liens could have been produced. The county recorder's office is not a depository of mortgages except for the temporary purpose of copying them into the record, and the fact that he does not have these instruments in his possession is of no significance whatever as a foundation for the offer of secondary evidence. Moreover, an uncanceled record of a mortgage, without more, is wholly insufficient to disprove the truthfulness of a representation that the property is unincumbered by mortgage liens. The mortgage debt may have been fully paid; it may have been barred by the statute of limitations, and many other reasons may be suggested why the record of the mortgage, though never formally canceled, does not necessarily import an existing lien. We may concede that upon a proper showing the contents of a deed or mortgage may be shown by introducing the record thereof or a certified copy of the record (Code, section 4630), but in the case before us the point sought to be established by the introduction was not simply that such mortgages had been executed and recorded, but that defendant's representations made at a later date to the effect that the lots were not incumbered were falsely and fraudulently made. Standing alone as it does, proof

of the record is wholly insufficient to support such a finding. The same question was before this court in *State v. Penny*, 70 Iowa, 190. In that case as in this the defendant was charged with obtaining money by false pretenses upon property falsely represented to be free from incumbrance. As in the present case it was sought to prove the falsity of the representations of the testimony of the county recorder who produced the record showing uncanceled mortgages on the property, and it was there held that such evidence was secondary, and that the testimony of the prosecuting witness showing the original instruments not to be in his possession was insufficient to make them admissible. The force of the suggestion above made is emphasized when we say that, aside from this showing of secondary evidence, there is not a word in the record to indicate that any person whomsoever has ever asserted any claim or lien under or by virtue of any of the alleged mortgages, or that any of said purchasers have ever suffered loss or damage on account thereof. That the admission of such evidence was prejudicial to the appellant is too clear for argument.

We reach this conclusion all the more readily from the fact that the case as made by the State upon the transaction between appellant and Mrs. Close is of a weak and unsatisfactory character. Taking the story of the prosecuting witness as literally true, it seems to present a case of false promises rather than of false pretenses in the legal sense of the term. The contract was reduced to writing, and the undertaking there is not that the property was clear of incumbrance at that date, but that, when the balance of the purchase money was paid appellant, a warranty deed showing clear title would be delivered to the purchaser. There is other testimony as to representations which have a tendency to establish the charge as made, but it is neither so direct, strong or positive that we can say that, without the incompetent evidence to which

we have called attention, the verdict must still have been the same.

Other questions have been argued by counsel, but those we have already discussed being decisive of the appeal we shall not protract this opinion for their consideration.

The cause must be remanded for a new trial.—*Reversed.*

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**MAGGIE WALLACE, Appellant, v. MARGARET WALLACE.**

**Default judgments: MOTION TO SET ASIDE.** While a motion to  
1 set aside a default is not the proper remedy when not filed within the statutory time, still where it contains all the essential allegations required in a petition for that purpose and is verified by attached affidavits, it will be treated as a sufficient petition under Code sections 4091 and 4094.

**Same: MISCONDUCT OF COUNSEL: PRESUMPTION.** Where a motion to  
2 set aside a default was confessed by plaintiff's attorney in the absence of defendant and his counsel, and time was given to answer, and upon expiration of such time a second default was taken which was again set aside on defendant's motion, the fact that the court was misled in making the order when the first motion was confessed may be inferred from the fact that the second motion was sustained.

**Same: FRAUD: NEW TRIAL.** A litigant will not be allowed to profit  
3 from the breach of an agreement between attorneys respecting a disposition of a cause; and where a motion to open a default was confessed in the absence of opposing counsel, although there was an understanding that the matter should not be taken up until both counsel were present and time was given to answer, of which defendant's counsel had no notice or knowledge, but upon expiration of the time a second default was taken, defendant is held entitled to a new trial on the ground of fraud under the provisions of Code section 4091.

*Appeal from Woodbury District Court.*—HON. F. R. GAYNOR, Judge.

WEDNESDAY, FEBRUARY 17, 1909.

MOTION to set aside a default was sustained, and the plaintiff appeals.—*Affirmed.*

*Skull, Farnsworth & Sammis* and *O. D. Nickle*, for appellant.

*F. B. Robinson* and *Jepson & Jepson*, for appellee.

LADD, J.—The defendant resides in Ireland. The plaintiff is the wife of her son, James Wallace, living in Sioux City. Another son, John M. Wallace, who had resided in that place, owned certain real estate prior to his death. A deed from him to a sister, Margaret Wallace (now Mrs. Tinney), appeared of record, and after his death another deed from Margaret Wallace (Tinney) to plaintiff was recorded. The plaintiff instituted this action to quiet title, and obtained a decree as prayed against defendant, March 20, 1907, on service by publication. Thereafter, and about August 20th of the same year, defendant by her attorney, Frank B. Robinson, moved to have the action retried, and that she be permitted to make defense. On September 17, 1907, O. D. Nickle appeared in court for plaintiff, and confessed the motion, whereupon the court ordered that security for costs and an answer be filed by October 1st following. As this was not done, on the following day Nickle demanded default, and an order to that effect was entered. The defendant on December 6, 1907, moved that the last-mentioned order be set aside and canceled, and the cause be opened and retried, and on hearing January 20, 1908, this motion was sustained. From this last order the plaintiff has appealed.

It will be noted that the motion was not filed until the term following that at which the order assailed was entered, and subsequent to the second day, so that relief by motion was not available. Sections 3790, 4093, Code. The remedy in such cases is by petition. Sections 4091,

4094. The motion for new trial, however, contained all the allegations essential to a petition, and all of these were verified by the affidavits attached thereto, so that the court might well have disregarded the objection that the remedy was by petition rather than by motion, and treated the paper filed as a petition, in compliance with the statute referred to. *Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa, 476. See, also, *Town of Storm Lake v. Railway*, 62 Iowa, 218; *Sitzer v. Fenzloff*, 112 Iowa, 491.

II. The default in this cause was procured through a bit of sharp practice indulged in by O. D. Nickle, attorney for plaintiff. Sometime after Robinson had filed his motion for a retrial these attorneys had a conversation, the accounts of which, appearing in their respective affidavits, do not differ very materially. Robinson swore that on the 4th or 5th day of September, 1907, O. D. Nickle, attorney of record herein for the plaintiff, came to me, and said, in substance: "I have been studying the law and the cases in reference to your application for a retrial in this case, and I understand that we have no right to appear or to contest or resist the same, nor even any right to notice, or to be present when you call it up, but as a matter of courtesy, I would like to have an understanding that you will let me know before anything is done about it. To which I replied that I was about to be gone from town for a month or so, and would not call the matter up for an indefinite time, as I was not ready to answer, not having sufficient information as yet to do so properly, that I had made the application that they might have knowledge of our intention to contest their judgment, and that I would be very glad to have them present whenever I should call it up for an entry by the court, and would notify Mr. Nickle, as requested." The affidavit also stated that Nickle, in calling up the motion for retrial, represented

1. DEFAULT  
JUDGMENTS:  
motion to  
set aside.

2. SAME:  
misconduct  
of counsel:  
presumption.

to the presiding judge that E. P. Farr, Esq., was associated with Robinson in the defense, and that he would notify him, and, upon procuring the order of default for failure to answer, falsely represented to the said judge that said Farr had been notified; that Robinson left the city September 5th, and did not return until October 4th, and three days later had a conversation with Nickle concerning his interview with Mrs. Tinney at Seattle, and they frequently met, but no reference was made to the default until on November 30th, when Robinson notified Nickle that he would call up the motion for retrial; that no motion book was used in the court; and that it was the uniform custom of the court, either to make sure that opposite counsel had been advised of the intention to procure an order, or cause him to be notified of its entry. Another affiant stated that she had heard the conversation between Robinson and Nickle when the latter told Robinson of the default. That Robinson said, "Did you not agree with me that this matter should only be called up by me, and that I should notify you before calling it up?" to which Nickle replied, "I asked you to notify me when you would call it up, but that did not prevent our confessing your motion at any time we wanted to." That Robinson said, "Even without notice to me, and during my absence?" and Nickle's response was, "Mr. Farr knew all about it." Robinson inquired "what Farr had to do with it," to which Nickle answered that "he was associated with you in the case." Farr's affidavit was to the effect that he was not employed in the case and was never advised by Nickle concerning anything in the matter. On the other hand, Nickle in his affidavit denied that the conversation with Robinson was "in words or substance" as stated by Robinson; denied that he ever falsely represented to said judge that Farr was associated with Robinson in the case, or that he would notify him, and stated that about August 1st, "I had just learned that he had filed a motion for a retrial."



in the *Wallace* case, and that I had not looked up the law on the question as to whether or not we are entitled to notice in proceedings of this kind, but that I did not want it called up for a day or two, until I could see what the law provided as to our right to appear therein, and that said Robinson in reply stated to me that he did not have his evidence in shape, and was not ready to call it up; that on the next regular assignment, being the next Monday of the September term of court, I assigned the said motion for hearing, Hon. F. R. Gaynor, Judge, setting it for Wednesday morning, September 11, 1907; that on Monday afternoon I met E. P. Farr, an attorney, whose affidavit is attached as heretofore mentioned, and he stated to me, in words or substance as follows: 'I see you assigned the motion in the *Wallace* matter this morning,' to which I replied that I had, and he said that Mr. Robinson was out of town, and would not be back for at least a week or two." He also swore that the day the motion for retrial was assigned for hearing he telephoned to the office of Robinson, and was informed that he was out of the city, that "for several days I attempted to get some one to appear so that the motion might be heard; that on September 17th he told the court of his conversation with E. P. Farr. Wallace, plaintiff's husband, swore that he was present at the time the order ruling on the motion for retrial was entered, and that Nickle represented that Farr was interested in the matter, but was not an attorney of record. The stenographer of Robinson made oath that she was at Robinson's office at all times during office hours, and that Nickle did not telephone there during Robinson's absence, and McHugh, who became Robinson's partner after the filing of the motion for retrial, stated that, though he met Nickle frequently during the time, no mention was made of the motion.

This somewhat extended statement of the contents of the several affidavits has seemed essential to the full under-

standing of the facts. Therefrom an understanding between Nickle and Robinson that the motion for retrial was to be taken up when Robinson should elect is clearly to be inferred. If for any reason Nickle thereafter concluded that Robinson was unduly deferring the matter, he should have so advised him. But according to the affidavits, Nickle, unbeknown to his adversary, and after he had lulled him into security by asking for a few days before the motion should be called, as he says, or that he be notified when it should be called, as Robinson swore and is the more likely, and by interposing no objection thereto when so promised, with the statement that he (Robinson) would be away some time ascertaining facts for his answer, and after Robinson had departed, as he was aware, went into court, and had the motion filed by Robinson assigned for hearing at a date when he knew Robinson would be absent. And on the day the order fixing the time for filing answer and cost bond, his only purpose in mentioning the alleged conversation with Farr to the court must have been to mislead the court into thinking that defendant was not unrepresented, and that an attorney interested in the cause was, or would be, aware of the order. That the court was misled does not appear from the affidavit of the presiding judge, but as the motion was ruled on by the same judge who made the order, it may be inferred that the court so found. See *Foley v. Leisy Brewing Co.*, 116 Iowa, 176; *Willett v. Millman*, 61 Iowa, 123.

Knowing that he had misled Robinson into thinking the motion would not be taken up until he so elected and advised Nickle, the latter procured the entry of default the day before his return, and then, although meeting him and talking of the case, made no reference to what had been done until nearly two months later. Such tactics can not be tolerated. Good faith in carrying out arrangements of this kind be-

3. SAME: fraud:  
new trial.

tween attorneys is absolutely essential to the orderly disposition of causes in court, and to allow a litigant to profit from their breach would be a reproach to the administration of justice. The case is not like *Johnson, Lane & Co. v. Nash-Wright Co.*, 121 Iowa, 173, for there the attorney having charge of the defense was notified, and another member of the firm was present, when default was taken. Here not only was Robinson not notified, but his adversary purposely waited until he was beyond reach, and then clandestinely, in so far as his opponent was concerned, procured the entry of default. This, as it was in violation of the understanding had, amounted to a fraud, such as contemplated by section 4091 of the Code, authorizing a new trial. The fact that the record recited that Robinson was present September 17, 1907, was no obstacle in the way of the court ascertaining the fact. Such a record is not to be treated as a verity when directly attacked, as here, in the same case, and for the manifest purpose of correcting errors in the prior proceedings of the court.

The order setting aside the default and allowing defendant to answer is *affirmed*.

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W. E. RATLIFF, Appellant, v. J. O. ELWELL and MARY E. ELWELL.

**Homestead:** PURCHASE WITH PENSION MONEY: EXEMPTION: RESULTING TRUST. A homestead in the name of the wife is subject to a judgment against her on a debt antedating its acquisition if in fact her property, though purchased with pension money of the husband; but if the entire consideration was paid by the husband from his pension money, and the naked legal title taken in the wife, to whom there was no intention of transferring the real ownership, nor understanding or duty to do so, the husband remains the equitable owner under a resulting trust, and the property is exempt from a judgment for an antecedent debt against either the husband or wife.

*Appeal from Union District Court.*—HON. H. M.  
TOWNER, Judge.

THURSDAY, FEBRUARY 18, 1909.

ACTION to subject the homestead of defendants, who are husband and wife, the property having been acquired with the husband's pension money, and at his request conveyed to the wife, to the payment of a judgment recovered by plaintiff against defendants after the acquisition of such homestead, but on an indebtedness antedating such acquisition. After a trial on the merits the court dismissed plaintiff's petition, and he appeals.—*Affirmed.*

*Robbins & Wilkie*, for appellant.

*N. W. Rowell*, for appellees.

MCCLAINE, J.—As plaintiff's judgment was on an indebtedness against both husband and wife antedating the acquisition of the homestead, the property would not be exempt to the wife from sale, under the judgment as against her, although purchased with her husband's pension money, if she was in fact the owner. *Whinery v. McLeod*, 127 Iowa, 11. But it was alleged in the answer that the husband was vested with and held the equitable title, although the legal title was in the wife; that the whole consideration paid for the property was paid by the husband with his pension money, and that after the payment of the consideration, and without any intent to relinquish, release, or part with his equity in said property, he on his own motion, and without any previous arrangement with his wife or procurement on her part, directed the legal title to be placed in her by means of conveyance from the person to whom the purchase money had been paid. This allegation was supported by the testimony of

both husband and wife, and there was no evidence to the contrary, nor were any facts shown casting discredit on such testimony. That one who pays the entire consideration for the purchase of property, and for his own purposes causes title to be placed in another, to whom he owes no duty to make conveyance, and without the intention of thus making the grantee the real owner, remains the equitable owner of the property under a resulting trust seems to be well established. *Malley v. Malley*, 121 Iowa, 237; *Seeberger v. Campbell*, 88 Iowa, 63; *Hagan v. Powers*, 103 Iowa, 593; *Culp v. Price*, 107 Iowa, 133. The case before us differs, therefore, from that of *Whinery v. McLeod*, *supra*, in the retention of equitable title by the husband paying pension money for its purchase. As the real title was not in the wife, the homestead can not be subjected to the payment of plaintiff's judgment as against her, and as the husband acquired his title solely by the payment of pension money, he holds such title exempt from judgment, even for antecedent debts. See Code, section 4010.

The decree of the trial court is therefore *affirmed*.

141	316
141	72
141	73
142	38

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J. R. WOOD & SONS, Appellants, v. J. A. GRIFFITH.

**Appeal on certificate:** DISCRETION. The power of the trial court to certify that a cause involving less than one hundred dollars is one in which an appeal should be allowed should be exercised with discretion, and where the questions involved are not of such doubtful character as to call for an adjudication by the Supreme Court the appeal will be dismissed without a review of the record.

*Appeal from Keokuk District Court.*—HON. K. E. WILCOCKSON, Judge.

THURSDAY, FEBRUARY 18, 1909.

ACTION for balance of \$35 alleged to be due resulted in a judgment for defendant. On the trial judge's certificate the plaintiff has appealed.—*Affirmed*.

*C. M. Brown*, for appellant.

*T. C. Legoe*, for appellee.

PER CURIAM.—No doubtful question of law is raised in the record before us, and, as the findings of the trial court on the issues of fact are as conclusive as a verdict of a jury, the conflict in the evidence precludes any interference with such findings. The only error we discover is that of the presiding judge in certifying that the cause is one in which an appeal should be allowed. See section 4110, Code. The theory of the statute in limiting appeals to this court to causes wherein the amount involved, as shown by the pleadings, exceeds \$100, is that little advantage can accrue to either party owing to the expense of an appeal where a lesser amount is in issue, and the questions raised are not likely to be of doubtful character. Exceptions, however, are recognized and so, when questions of law are presented in a cause in which the amount involved in the pleading is \$100 or less which should be determined in order that the decision may serve as a precedent, the trial judge by an appropriate certificate may allow an appeal. Section 4110, Code. Formerly the precise question was required to be certified. Section 3173, Code 1873. Now, the judge merely certifies that the cause is one in which an appeal should be allowed. This should not be done as a matter of grace to a party applying therefor, but solely on the ground that the questions raised by the record are of such doubtful character as to call for adjudication by this court. *McLaughlin v. Bradley* (Iowa), 118 N. W. 389.

We are of opinion that there was an abuse of discre-

tion in allowing the appeal, and, for this reason, the judgment will be affirmed without reviewing the record.—*Affirmed.*

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**S. E. NIXON and others, Appellants, v. THE CITY OF BURLINGTON and others, Appellees.**

**Municipal corporations: SPECIAL ASSESSMENTS: ESTOPPEL.** Property owners who have appeared before the city council and urged their objections to a proposed special assessment for a public improvement, and having failed to appeal from the action of the council with respect thereto, are thereafter estopped to question the assessment or maintain an action to enjoin its enforcement, unless the council was wholly without jurisdiction to order the same.

**Public improvement: RESOLUTION OF NECESSITY: VOTE OF COUNCIL.** The statute requiring a three-fourths vote of the council in ordering a street improvement when not petitioned for has no reference to the action fixing the time when the resolution of necessity will be heard, a majority vote of the council being sufficient for that purpose; but the three-fourths majority vote applies to the final vote ordering the improvement.

**Same: LETTING OF CONTRACT: RECORD OF VOTE.** The record of a city council's vote in letting a contract for a public improvement is sufficient if made upon sheets of roll calls specially prepared for that purpose.

**Notice of resolution of necessity: PUBLICATION ON SUNDAY.** The fact that the last publication of a notice of resolution falls on Sunday will not render the notice insufficient; as purely ministerial acts may be lawfully performed on Sunday.

**Resolution of necessity: DETAILS OF PROPOSED IMPROVEMENT.** It is not necessary that the preliminary resolution of necessity for paving a street state the details of all materials to be used and the method and manner of their use; so that omission from such resolution of any mention of the foundation for the pavement did not render it fatally defective.

**Special assessments: WAIVER OF OBJECTION.** The city council may by appropriate legislation provide for a wider pavement than that contemplated by the original contract, even after work

under the first contract had commenced, if convinced that public convenience requires it; and if there was any irregularity in the proceedings by which the burden of the tax payer was unduly increased the remedy is an appeal from the assessment, otherwise the objection is waived.

**Same.** Objections that the notice to contractors was not definite 7 and specific; that the record of the city clerk does not show whether an improvement was made upon petition or on motion of the council; that a fair and impartial hearing of objections to the assessment was not accorded tax payers, do not go to the jurisdiction of the council and the remedy is by appeal.

*Appeal from Des Moines District Court.*—HON. W. S. WITHROW, Judge.

WEDNESDAY, MARCH 11, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION in equity to restrain the defendant city and its officers from levying special assessments for the expense of certain street paving. The trial court dismissed the bill, and plaintiffs appeal.—*Affirmed.*

*J. T. Illick*, for appellants.

*E. L. Hirsch and Seerley & Clark*, for appellees.

WEAVER, J.—Concerning the essential facts of this case there is little, if any, dispute. The city of Burlington is divided into seven wards, and its council is made up of one member from each ward and two members at large, presided over by the mayor. A vacancy in the said body created by the resignation of one of the members at large remained unfilled from January 2, 1906, until April 1, 1906. At a regular meeting of the council of March 19, 1906, a resolution of necessity was presented for the paving and curbing of Maple Street, from Eighth Street to



Sumner Street, the pavement to be laid with brick, and to be forty-eight feet wide between the curbs from Eighth Street to Central Avenue and thirty feet wide from Central to Sumner. It also proposed the assessment of the cost of the improvement upon the abutting property, and named April 16, 1906, as the date for final consideration of the resolution. On this action the city record shows a roll call and a vote of six yeas and one nay. Notice of this resolution was published in a daily paper of the city from Thursday, March 22 to Sunday, March 25, inclusive. On April 16, 1906, a written protest signed by most of the owners of the abutting property was presented to the city council, setting forth the reasons why said improvements should not be ordered. The resolution of necessity, in the terms above stated, was then passed by a vote of seven yeas to two nays. A further resolution directing the city engineer to advertise for bids for the paving according to plans and specifications was then adopted by a vote of six yeas and three nays. Acting upon this instruction, the city engineer prepared a notice to contractors which he caused to be published in a daily newspaper of said city on Saturday, April 28, and Sunday, April 29, soliciting proposals for grading and curbing the street, and paving the same with brick on a six-inch concrete foundation according to plans on file in the engineer's office, such bids to be received until 4 o'clock p. m. of Monday, May 7, 1906. On May 14, 1906, the city by its officers entered into a contract with the Burlington Construction Company to construct the contemplated improvement. After the work had been for some time in progress, the city council appear to have thought it advisable to increase the width of the pavement between Eighth Street and Central Avenue from forty-eight feet to fifty-six feet by extending the same a distance of four feet on either side. To that end a resolution of necessity was presented to the council on July 16, 1906, naming August 6, 1906,

as the date for final action thereon. Notice of this action was published on July 17th, 18th, 19th and 20th, and on August 6, 1906, the resolution was adopted and notice to contractors published on August 8 and August 9, 1906, for bids to be presented on or before August 20, 1906. The contract was let to the Burlington Construction Company at the price per yard named in the first contract. On October 15, 1906, the work having been completed, separate resolutions were introduced in the city council to levy the cost of the improvement under the contracts aforesaid upon the abutting property, setting forth a list of the property and the proposed amount chargeable to each lot or parcel of land. It was thereupon ordered that November 19, 1906, be set for the hearing of objections, if any, which might be made to such assessments by the owners of the abutting property, and notice of said action and of the amount of his assessment was given to and received by each of the plaintiffs herein, all of whom owned property abutting upon said improvement. On the date named the plaintiffs appeared before the council and each filed written objections to the assessments, alleging that they were in excess of the benefits, in excess of 25 percent of the value of the property, that the proceedings in ordering the improvement and letting the contract had not been conducted according to law, and that the street railway company had not been assessed with its proportion of the burden. These objections were overruled by the council, and the assessments levied as proposed. No appeal from this action or from any order made by the council with reference to said improvement was ever taken to the district court. The foregoing history of the case, set forth with more than ordinary detail, will enable us to review the controlling questions presented in argument without further reference to the pleadings.

I. The statute under which the pavement was ordered constructed having provided for a hearing by the

council of all objections to the proposed levy of special assessments therefor (Code, section 823), and having further provided that all objections to errors, irregularities, and inequalities not so presented for hearing shall be considered waived (Code, section 824), and it being still further provided that persons aggrieved by the orders and decisions of the council have a right of appeal therefrom to the district court, where all questions touching the validity of such assessment which have not been waived may be heard and determined (Code, section 839), it follows of necessity that having appeared before the designated tribunal and made known their grievances, and having failed to appeal from the order made thereon, the property owners are thereafter estopped to question the assessments or maintain action to enjoin their enforcement, unless it be found that the council was wholly without jurisdiction in the premises. *Crawford v. Polk County*, 112 Iowa, 118; *Nugent v. Bates*, 51 Iowa, 77; *Macklot v. City*, 17 Iowa, 387; *Harris v. Freemont*, 63 Iowa, 639; *Collins v. Keokuk*, 118 Iowa, 30; *Stevens v. Carroll*, 130 Iowa, 465; *Owens v. Marion*, 127 Iowa, 469; *Comstock v. Eagle Grove*, 133 Iowa, 589. Indeed, the appellants do not deny the general correctness of this proposition, but claim that in the present instance the proceedings of the council were so defective as to be void for want of jurisdiction.

II. The first alleged defect has reference to the sufficiency of the vote in the council by which the first resolution of necessity was adopted. The objection made is that the proceeding having been initiated upon the council's own motion, and not upon the petition of the majority of the property owners, it required a vote of three-fourths of the council in support of the order, and that the vote taken did not, in fact, fulfill said require-

1. MUNICIPAL CORPORATIONS: special assessments: estoppel.

2. PUBLIC IMPROVEMENT: resolution of necessity: vote of council.

ment. The objection indicates a misapprehension of the record, and of the force and effect of the statute. The provision of the statute referred to (Code, section 793) is that "the construction of the improvement shall not be ordered made until three-fourths of all of the members of the council shall assent thereto, unless the same shall be petitioned for by the owners of a majority of the lineal front feet of the property abutting thereon." Now, when was this improvement "ordered made?" Certainly not at the meeting of March 19, 1906, when the resolution of necessity was presented. Under the statute (Code, section 810) all the council was authorized to do at that meeting was to receive the resolution, and fix the date at which after due notice it would be put upon its passage. This order was made as we have seen by a vote of six yeas to two nays. The vote was a clear majority of the entire council (making no deduction for the single vacancy then existing), and this in our judgment was all that was required. By its express terms the statute requiring the three-fourths vote has reference only to making the order for the improvement, and this was not attempted in the present instance until the meeting of April 16, 1906, when the resolution was passed, and the order made by a vote of seven yeas and two nays; the vacancy in the council having been filled. This was clearly a compliance with the statute, and the objection to the sufficiency of the vote can not be sustained.

Objection is also raised to the sufficiency of the record of the vote by the council for the letting of the second contract: It would seem that the clerk did not set out a detailed statement of the vote in the general record book, but did record the same upon sheets of roll calls specially prepared for that purpose, and this, we think, was sufficient compliance with the statute. Moreover, it does appear that all members of the council were present, that a roll call was taken

3. SAME: letting  
of contract:  
record of vote.

on the passage of the resolution, and that all voted in the affirmative.

III. The statute provides that twenty days' notice of the date when the proposed resolution of necessity will be considered by the council shall be given by four publications in some newspaper of general circulation published in the city. The notice in this instance was, in fact, published on each of four successive days in one of the papers of the city more than twenty days prior to the hearing, but the last of these publications occurred on Sunday; and the point is made that such publication can not be taken into consideration, and that in the eye of the law there were but three publications, and any action based upon such incomplete notice is void. It is not to be denied that there is authority tending to support this contention. *Scammon v. Chicago*, 40 Ill. 146; *Shaw v. Williams*, 87 Ind. 158 (44 Am. Rep. 756). But this court is committed to the doctrine that, while the transaction of judicial business on Sunday where not clearly authorized is without authority, yet mere ministerial acts may be lawfully performed on that date. In *State v. Ryan*, 113 Iowa, 538. In 20 Encyc. Pl. & Prac. 1197, this is said to be the prevailing rule in the absence of any prohibitive statute. See, also, *S. & L. Society v. Thompson*, 32 Cal. 347. We are satisfied with the rule as stated, and see no reason to abandon the position taken by us in the *Ryan* case. The publication of the notice was sufficient.

IV. The resolution of necessity described the proposed pavement as one to be constructed of brick and forty-eight feet wide between the curbs; no mention being made as to the foundation or substructure. The council's order to the engineer was to advertise for proposals "for paving Maple Street according to the plans and specifications on file in his office." The advertisements, as made,

4. NOTICE OF  
RESOLUTION OF  
NECESSITY:  
publication  
on Sunday.

5. RESOLUTION  
OF NECESSITY:  
details of  
proposed  
improvement.

called for proposals for the grading, curbing, "paving with brick on a six-inch concrete foundation," and the contract was let on the basis of such specification. Counsel make the point that, as the first resolution of necessity did not mention the requirement of a concrete foundation, the council had no authority to let the contract containing such provision. It is true the statute (Code, section 810) requires the resolution to state, among other things, the kind of pavement proposed and the method of construction; but this, we think, does not make it mandatory that all details of the materials to be used and the method and manner of their use shall be set forth in the preliminary resolution. The office of the published notice is not, we think, to describe the proposed improvement with minute specifications but rather to apprise the public and persons interested of its general character, and give opportunity for investigation and for protest by those desiring to make it. The engineer is presumed to be prepared with the details and with the plans and specifications according to which the work must be performed. Notice that the pavement is proposed to be built of brick, granite, asphalt or wood blocks implies the purpose to construct it upon a sufficient foundation, and in the usual and approved manner. Common observation teaches us that the work of paving ordinarily calls for the use of a large amount of materials other than the principal item from which the pavement under consideration takes its name, and it would be impracticable to burden a resolution of necessity with their recitation. It is sufficient that they may be ascertained by reference to the proper office where interested property owners and contractors may obtain the necessary information. There was no fatal defect in the resolution in this respect.

V. The action of the city council in providing for an increase of the width of a part of the pavement of Maple Street is made another ground for objecting to

the validity of the assessment. It is possible, as argued on behalf of the appellant, that the manner in which this was done was unwise or unbusinesslike; but we discover no reason therein for holding the assessment void. If, after entering upon the performance of the work under the first contract, the city council became convinced that public necessity or public convenience required the pavement to be wider than was first contemplated, it would seem to be reasonably within the scope of power vested in that body to legislate upon the subject, and to take the necessary measures to accomplish that purpose. The proceedings had with reference thereto seem to be in substantial conformity with the statute, and, if there was any error or irregularity therein by which the burden of any taxpayer was unduly increased, the remedy therefor was provided in the right to appeal from such assessment to the district court. No appeal having been taken, the objection must be held to have been waived.

VI. Finally, it is said that the notice given for proposals by contractors was not sufficiently definite and specific; that the clerk in recording the order for the improvement failed to state whether such order had been made upon the petition of the property owners or upon the motion of the council; that a fair and impartial hearing of the plaintiffs' objection to the assessment was not accorded by the council; that a committee of the council appointed to confer upon the matter of their complaint refused to accord them a hearing, but none of these matters go to the jurisdiction of the council, and, as already suggested, the remedy for such grievance is by appeal.

We find no ground for disturbing the decree entered by the district court, and the same is *affirmed*.

6. SPECIAL ASSESSMENTS: waiver of objection.

7. SAME.

MAGGIE P. WEBSTER, Appellant, v. THE SHRINE TEMPLE  
COMPANY and others, Appellees.

141	325
143	148

**Boundaries:** ADVERSE POSSESSION. Mere possession by a lot owner  
1 of adjacent land with no intention of asserting title beyond  
the true boundary does not constitute such adverse possession  
as will ripen into title.

**Same:** ACQUIESCENCE; BURDEN OF PROOF. A boundary line may be  
2 established by acquiescence, but where the claimed line differs  
from the true boundary the burden is upon the one asserting  
the claim of acquiescence to show that the same has been rec-  
ognized by both parties as the true line for the statutory period.  
Evidence held insufficient to show acquiescence.

*Appeal from Polk District Court.*—HON. HUGH  
BRENNAN, Judge.

TUESDAY, SEPTEMBER 22, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION to determine a disputed boundary line and  
quiet title. Decree for defendants, and plaintiff appeals.  
—*Affirmed.*

*Sullivan & Sullivan* and *Dunshee & Dorn*, for appel-  
lant.

*Read & Read* and *C. L. Nourse*, for appellees.

WEAVER, J.—The plaintiff is the owner of the south  
half of lot 1 in block 4 in Holcomb's addition to Des  
Moines. The defendant Shrine Temple Company is in  
possession of the north half of said lot under a contract



of purchase from the First Methodist Episcopal Church of Des Moines, which for many years prior to April, 1905, had occupied and used it as a site for its church building and parsonage. The lot as platted has a frontage of sixty-six feet and depth of one hundred and thirty-two feet, the evidence tends to show that in actual measurement it is somewhat in excess of the width named. The deeds in the line of the plaintiff's title describe her property as the south half of the lot, and in the line of the defendants' title as the north half thereof, and in neither case is the width of the property conveyed expressly mentioned. Plaintiff and her grantors have for many years occupied the south half of the lot as residence property. The parsonage building on the north half stands at or near the south line of the church property, and for some years a fence has extended from the east front of the lot to a point near the southeast corner of the parsonage building, and from at or near the southwest corner of said building to the west end of the lot. It is claimed by the plaintiff that these fences and the eaves line of the parsonage mark the division between the two tracts, and this division or boundary she claims has been established and determined by adverse possession and by the acquiescence of all parties in interest for more than ten years. The trial court found against plaintiff on both propositions, and she appeals.

I. Cases of this general character have been so frequently before the courts, and the law governing them is so well settled, that we do not deem it proper to consume the time or space to review them. The only debatable propositions presented by the appeal are those of fact, and nothing is to be gained by an extended statement of the testimony. We have first to inquire whether there is any showing of facts on which the court can uphold the claim of adverse possession. An examination of the record leads us to agree

1. BOUNDARIES:  
adverse  
possession.

with the trial court that this inquiry must be answered in the negative. The plaintiff, testifying as a witness, expressly admits that she never at any time intended to make any claim to the property other than such as belonged to her, and that she claimed up to the alleged boundary because she believed and supposed it to be the correct line. Under the rule established in this State, possession thus taken and held by mistake, and without intention to assert title beyond the true boundary, is not adverse, and, without more, never ripens into title. See *Miller v. Mills County*, 111 Iowa, 654, and cases there cited. Moreover, the conduct of the plaintiff on the one hand and the church authorities on the other, as developed in the testimony, tends strongly to rebut the theory that plaintiff and her grantors made any claim of right or title to the property, except so much thereof as was included within the true boundaries of the tract described in their deeds.

II. The only other question to be considered is whether the plaintiff has shown such acquiescence in the line marked by the fences and the eaves line of the parson-

age as will entitle her to a decree under our statute. For the purposes of this case it may be admitted that, if the plaintiff has

2. SAME: acquiescence: burden of proof.

succeeded in showing that the owners of the property on both sides have recognized and acquiesced in the line to which she now claims for a period of ten years or more, she is entitled to the relief demanded. But in our opinion the evidence does not bear out her contention. The fences to the east and to the west of the parsonage were not constructed to coincide with the extension of the eaves line which plaintiff claims marks the boundary. At the southeast corner of the parsonage there was an open passageway, and at the southwest corner a gateway, giving the occupant of the north half of the lot entrance to the strip now in dispute. The parsonage, which was originally built further to the north, was latter moved to the

south and so located as to project southward beyond the line of the fence. During the years since the fence was built the occupants of the north half of the lot appear to have used and claimed the right to use the disputed strip, or parts thereof, and have exercised that right. I. N. Webster, who at one time held the title to the south half and is the principal witness for plaintiff, being asked whether persons representing the church during the last twenty or twenty-five years came over on the south side of the fence to paint and make repairs, replied: "Yes, sir; they used it just as though it was theirs. I have been furnishing a lot there for the last twenty-five years." Other indications are not wanting that the fence was mutually regarded as a merely tentative line; the location of the actual line having never been definitely ascertained. The burden was upon the plaintiff to show the necessary acquiescence, and we are satisfied that in this she has failed.

The surveys made and shown in evidence indicate that the true line is at the point fixed by the trial court, and the decree appealed from is *affirmed*.

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HENRY FITZGIBBON, Appellee, v. WESTERN DREDGING  
COMPANY ET AL., Appellants.

**Drainage: CONSTRUCTION OF DITCH: INJURY TO ADJACENT LAND:**

- 1 LIABILITY OF CONTRACTOR. In excavating a drainage ditch in a district established by public authority the contractor is required to use reasonable care to avoid injury to adjacent lands; but he is not liable for injury the natural result of carrying the plan of drainage into execution

**Same: MEANS EMPLOYED FOR EXCAVATING.** In constructing a public

- 2 drainage ditch the contractor may employ the means and method of excavation usually and generally approved for that kind of work, where there is no provision otherwise in the contract.

**Same.** Where the plan of a public drainage ditch cuts across the course of a stream, but there was no provision of the contract requiring the contractor to take care of surplus water by means of a dam or by-pass, he was not liable for injury to adjacent lands on account of overflow from the ditch of water naturally accumulating therein, where he followed the plan furnished, used the usual machinery for such work and by no act or omission of his own increased the flow.

*Appeal from Harrison District Court.*—HON. A. B. THORNELL, Judge.

TUESDAY, SEPTEMBER 29, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

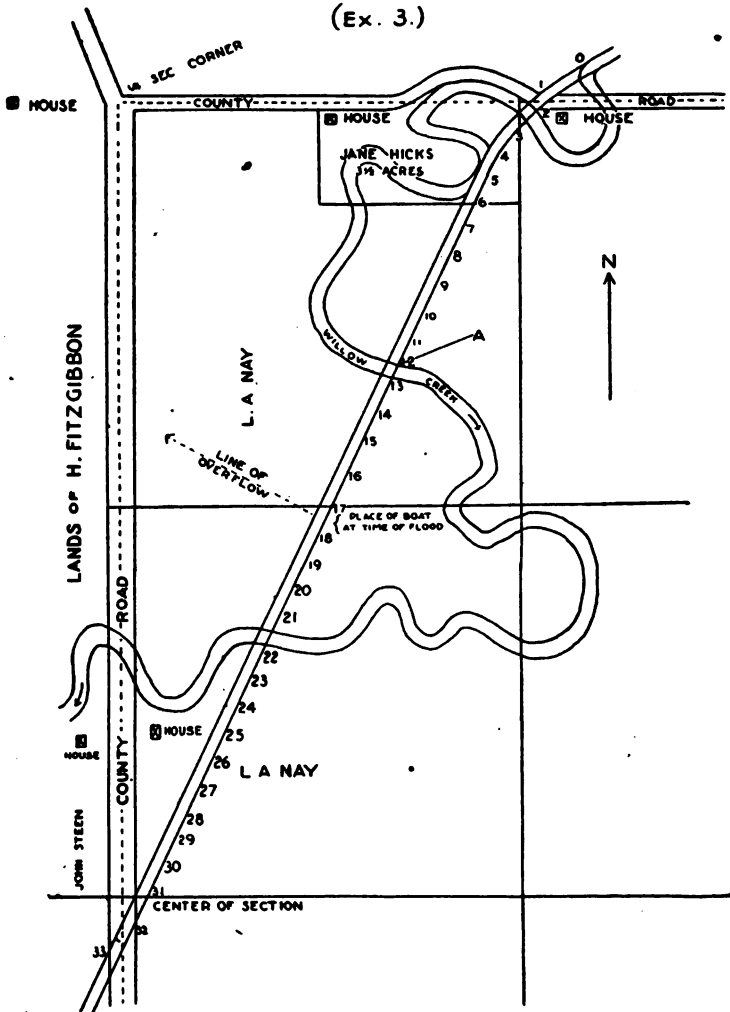
ACTION at law to recover damages to crops by overflow occasioned by the alleged negligence of defendants. Judgment for plaintiff, and defendants appeal.—*Reversed.*

C. W. Kellogg, for appellants.

J. S. Dewell, for appellee.

WEAVER, J.—The counties of Harrison and Pottawattamie, Iowa, having by appropriate actions of their respective boards of supervisors established a drainage district embracing lands in both jurisdictions, the contract for excavating the required ditch was let to the defendants. At the point involved in this controversy the course of the ditch is along the general course of a waterway known as "Willow creek," but, as said channel is very crooked, the ditch in places cuts across its loops and bends, shortening the route of its flow. The general situation and the location of plaintiff's land with reference to the ditch are made reasonably clear in the accompanying plat:

(Ex. 3.)



Plaintiff's demand for a recovery in this action is based upon the theory that defendant in constructing the ditch and working in a southwesterly direction down the course of the stream cut through its banks at the point marked A on the plat, and in so doing negligently obstructed the channel, and after cutting through the south-

westerly bank failed to restore or close it against the escape of the waters of the creek into the ditch, and failed to protect the adjacent lands from the resulting overflow by providing an outlet or escape therefor into the creek below in advance of the dredge or by other reasonable means protecting such lands from injury. It is further claimed that, by reason of such negligence, the water from the creek swollen by storm passed into the ditch and overflowed its banks, and extended westward across the land of an intervening owner to the land of the plaintiff, and caused the injury of which complaint is made. The allegations of negligence and damage are denied by the plaintiff. There is substantial harmony in the testimony as to many of the material facts to be considered, and the arguments of counsel are directed in the main to questions of law which they believe to be involved in the appeal. Of these we think it necessary to discuss the following only. Among other things, the court charged the jury as follows:

As before stated, it appears without conflict that the defendants were not acting wrongfully or illegally in digging the ditch in question, but were doing it under the authority of law; and it further appears that at the time of the flood in question, and at the time the defendants cut the banks of Willow creek, the ditch was being dug by defendants on the line and substantially according to the plan adopted by the counties in providing for said ditch. Under such circumstances, the defendants had the right to cut the banks of Willow creek, and their act in so doing was not illegal nor negligent. But if when taking into account, so far as shown by the evidence, the flow of water in the creek, and all that was known to the defendants, or ought to have been known to them in the exercise of reasonable care upon their part, as to what floods were likely to occur along said stream and ditch before they would again reach said creek at a point lower down in the construction of said ditch, it appears from the evidence that reasonable prudence would have dictated

when they cut the bank of the creek and crossed same with the ditch, that they should have closed up the opening thus made in the bank of the creek with a dam, or should have provided some outlet ahead of their dredge boat to carry the flood waters likely to come down the ditch, and thereby prevent same from flooding the lands adjoining or near the ditch, then it was their duty to do so, and if, under such circumstances, it appears that they failed to build such dam or to provide such outlet, such failure on their part would constitute negligence.

The central thought of this instruction, that in performing their contract it was defendant's duty to use reasonable care in the manner and method of its performance

1. DRAINAGE: construction of ditch: injury to adjacent land: liability of contractor.

to avoid injury to the adjacent lands, is undoubtedly correct. It is equally true that, the ditch being constructed by the State acting through its local agencies in the exercise of its power of eminent domain, the contractor and laborers who do the work of actual excavation are not liable for damages which naturally result to said lands from carrying the scheme or plan of drainage into execution. In other words, if the contractor or laborer makes the ditch substantially in accordance with the plan furnished him, taking reasonable care to avoid doing or causing unnecessary injury to adjacent lands, he is not charged with responsibility for injurious effects which naturally follow the authorized improvement.

In the absence of any provision to the contrary in the contract, it will also be conceded that the contractor may employ means and methods of excavation which are

2. SAME: means employed for excavating.

usual and approved generally among persons performing that kind of service. As is well known, drainage ditches of any considerable proportions in this State are quite generally constructed by the use of steam dredges mounted on a boat or raft working from the highest elevation on the route down grade in the direction of the outlet, the boat or raft float-

ing upon the water which accumulates in the ditch as the work advances. Naturally the further the work progresses the larger the body of water which may be expected to accumulate behind the dredge, and, where many ponds or swampy places are tapped, it is inevitable that some of the water so collected will fill or overflow the banks of the ditch before the pressure is relieved by the completion of the excavation to some outlet. For damages caused by such overflow, the contractor under the rule already stated is not to be held liable without it being shown that such overflow was caused or augmented by some negligent act or omission on his part. There is no contract relation express or implied between him and the landowner, and the measure of his duty in the premises is found in the general rule which binds each person to so use and enjoy his own rights and privileges as to avoid injury to his neighbor. We can conceive that if it were alleged, and there were any evidence to sustain the allegation that it was customary or usual for contractors under such circumstances to guard against the excessive accumulation of water in the ditch by damming the flow or by digging a by-pass ahead of the dredge to some outlet, and that the contract was made with reference to such custom or usage, a very different conclusion might be reached. But there is neither allegation nor evidence to that effect in the case before us, and upon such a record we are persuaded that failure to make use of this expedient can not be held to be negligence.

The defendants were employed to construct a ditch, an open channel for the flow of water, and not to dam the flow thus provided for. The plan required the ditch to

3. SAME.

be cut across the course of Willow creek at the particular point, and the fact that water from said channel would run into the ditch and follow the course of the dredge must have been anticipated by all parties concerned. In the very nature of



things, having cut through the banks of the stream, it would be impracticable to dam the opening thus made until the dredge had proceeded far enough for the boat or raft carrying the machinery to pass through, and the time required to thereafter construct a dam may have been sufficient to carry the dredge forward to the outlet provided by the next crossing of the course of the stream. A dam across the ditch which would have been sufficient to protect the plaintiff's land might have served to overflow and injure the land of some other proprietor. If the contractors are to be held to care for the surplus water in the ditch by constructing dams and digging by-passes, it will be readily seen that such responsibility will often involve largely increased liability, and necessitate a corresponding increase in the compensation to be paid for these works of public improvement. It would doubtless be competent for the board of supervisors in letting the contract to provide that the contractors shall, by the construction of dams and dikes or other suitable devices, prevent the overflow of water from the ditch to adjacent lands, and possibly this provision would be available to the owner of such lands in an action *ex contractu* under a principle analogous to that which was applied in *Hipwell v. Surety Co.*, 130 Iowa, 656. Where such condition is exacted, the contractor is forewarned and makes his bid with the obligation in view; but, where no such condition is provided, and the contractor undertakes simply to excavate the ditch on the line according to the plan laid down for his guidance, he does not in our judgment assume any liability for the care of the water naturally accumulating behind his dredge. He must not, of course, by his own negligent act or omission increase the amount of water in the ditch beyond that which naturally accumulates from its construction according to the authorized plan, nor by his negligent opening or breaking down or weakening the banks contribute to the escape of the water to the in-

jury of others, and for failure of duty in this respect his liability can not be questioned. But, in the absence of any other showing than the undertaking to excavate the ditch according to a given plan, we think the contractor is under no duty to protect adjacent lands against overflow from such ditch by diking its banks or damming the channel which he makes or by constructing by-passes to carry off the floods. If a city orders the grading of a street upon a plan the natural effect of which is to arrest the escape of surface water, and set it back upon the property of adjacent owners, the contractor or employee who performs such work according to the plan is not liable for the injuries resulting, unless he contributes thereto by some negligence on his part. We think no one would contend that he must take notice of the defects in said plan and provide means by which to protect the adjacent property against injury arising from the fault of the city in planning the improvement. *Pearson v. Zable*, 78 Ky. 170; *Shaw v. Crocker*, 42 Cal. 435. If this be true, and we doubt if any authority can be cited to the contrary, we can conceive of no reason for applying any different rule to cases like the one now before us. *Chapel v. Smith*, 80 Mich. 100 (45 N. W. 69).

The trial court in the case at bar correctly held as a matter of law that the defendants had the lawful right to excavate the ditch across the course of the stream, and that at the time of the injury complained of they were doing said work in substantial accordance with the authorized plan. There was also no error in stating that, in performing their said contract, the defendants were bound to exercise reasonable care to avoid the unnecessary flooding of the adjacent lands, but we hold that no case was made by the plaintiff which would justify the jury in charging defendant with negligence in failing to intercept and prevent such flow by damming the ditch behind the dredge, or by constructing some temporary ditch or trench

to carry off the surplus waters, and that the submission of such question to the jury was prejudicial error.

Other alleged errors are not likely to arise on a retrial, and we shall not discuss them.

For the reasons stated, a new trial must be ordered. The judgment of the district court is therefore *reversed*.

141	333
141	518

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NICK BURCHARDT, Appellant, v. WILLIAM SCOFIELD,  
Appellee.

**Taxation: ERRONEOUS SALE: OFFICIAL RECORD OF SAME: RIGHTS OF**  
1 OWNER. Where a tax payer has paid the taxes demanded of him but the treasurer gave him a receipt covering an incorrect description by omitting a portion of the premises, and after sale but before time for redemption expired he discovered the error and made a notation on the tax record of the fact that the sale was erroneous, as authorized by statute, the owner can rely on the record so made; and the treasurer has no authority to erase the entry and issue a deed to the purchaser without notice to the owner and an opportunity given for him to protect his rights.

**Same: NEGLIGENCE: EQUITABLE RELIEF.** A tax payer is not to be  
2 charged with negligence simply because he relies upon information given him by a county treasurer respecting the taxes he is required to pay, and if, having made timely effort to pay the same or to redeem from a sale, he is misled by the conduct or mistake of the officer a court of equity will grant him relief.

*Appeal from Washington District Court.*—HON. W. G. CLEMENTS, Judge.

MONDAY, OCTOBER 26, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION to set aside tax deed and to redeem land from tax sale. Decree for defendant, and plaintiff appeals.—*Reversed.*

*Charles A. Dewey*, for appellant.

*W. M. Keeley*, for appellee.

WEAVER, J.—The record in this case is quite complicated, and not a little difficult to understand, but we gather therefrom the following facts: Prior to September 28, 1901, the plaintiff owned among other tracts in the same section, twenty-three and three-quarter acres of land in section 27, township 74, range 8, in Washington County. Of this land fifteen acres constituted a part of the west half of the southeast quarter of the northeast quarter of said section, while the remainder lay on the other side of the half section line. The land now in controversy is the north five acres of the fifteen-acre tract. On the date above named plaintiff conveyed the twenty-three and three-quarter acres to one Simpson, who held the same until the year 1905, when he reconveyed all of the tract to plaintiff. In 1902 Simpson, who then owned no other land in said section, paid the taxes on the entire twenty-three and one-half acres for the year 1901, and on October 28, 1903, offered to the county treasurer to make payment of the taxes thereon for the year 1902. It appears, however, that none of the land had been assessed in his name, and the five acres in question were assessed to one Van Sant, a former owner, while the rest of the twenty-three and one-half acres was included in the assessment to the plaintiff Burchardt, who was the owner of several other small tracts in the immediate vicinity. The description of Simpson's land being somewhat complicated, he or the treasurer, or both, appear to have become confused over it, with the result that the treasurer received the taxes,

and issued to Simpson a receipt for the taxes of 1902 upon twenty-three and one-half acres of land by an indefinite description, which, as near as can be traced, covers land immediately south and east of the true description. At the tax sale in December of the same year, the tax assessed to Van Sant upon the five-acre tract being unpaid, said tract was struck off to the defendant herein. Later when Simpson reconveyed to plaintiff, he passed over to the grantee the tax receipt above mentioned, and plaintiff, being unable to identify the land by its description as a fractional part of the section, took it believing it evidenced the payment of the taxes upon the entire twenty-three and one-half acres. The evidence, however, tends to show that Simpson had become aware of the tax sale, and visited the treasurer's office, where he exhibited his receipt, and asked to have the matter corrected. He claims to have been informed by the treasurer, who does not deny the statement, that an error had been made, and the money received from defendant for the sale of this tract would be refunded to him, thus clearing the cloud from Simpson's title. After plaintiff had become repossessed of the title he employed the assistance of one Deeds, and went with him to the treasurer's office, where he again exhibited the tax receipt, and with the aid of counsel sought to have the land relieved from the sale. The treasurer, appearing to be convinced that it was a meritorious case, wrote upon the proper book, opposite the record of the tax sale of the five-acre tract, as provided in Code, section 1447, the following entry: "Erroneous. Double assessment. Get refund by order of Board." This entry was made both in the Auditor's record of sales, and in the appropriate books in the treasurer's office. Plaintiff testifies that at the time this entry was made he informed the treasurer he was ready and willing to pay the taxes, if any were required, to clear the land from the claim, but was informed by said officer that no payment was necessary, as the board of

supervisors would refund the money to the defendant. Thereafter, the three-year period of redemption having expired, the defendant presented his certificate of purchase to the treasurer, and demanded a deed. The treasurer thereupon, after some investigation and inquiry, but without notice to plaintiff, erased from his books the entry we have above quoted, and executed and delivered the tax deed under which the defendant claims title.

We have been favored by quite elaborate briefs by counsel for the respective parties, discussing various phases of the law governing tax liens and tax titles, but we think it unnecessary to review all the points made.

1. TAXATION:  
erroneous  
sale: official  
record of  
same: rights  
of owner.

We regard it as well established by the record that Simpson, who then held the title, applied in due time and in good faith to the county treasurer to pay the taxes on the land in question. He paid the taxes demanded of him, and the treasurer gave to him a receipt therefore covering an indefinite ambiguous description, which, so far as it is capable of location, does not seem in fact to include this tract. After the sale had been made, but before the time for redemption had expired, the attention of the treasurer being called to the confusion in the record, and to plaintiff's claim that the tax had been paid, he conceded the claim, and, following the direction of the statute above quoted, made an entry upon the record designating this sale as erroneous, and presenting a proper case for a refund by the county to the purchaser, and therefore requiring no redemption by the plaintiff. In our judgment the plaintiff had a right to rely upon this action of the treasurer, and upon the record so made, and the treasurer could not rightfully thereafter erase such record, and issue a deed to the purchaser, without notice or opportunity to plaintiff to redeem or otherwise protect his rights in the premises. The statute referred to provides that when it shall be made to appear to the treasurer, before the execution of a deed for

land sold for taxes, that such taxes had in fact been paid before the sale, he shall make an entry opposite such tract in the sale book that the same "was erroneously sold, and such entry shall be evidence of the fact therein stated, and the purchase money shall be refunded to the purchaser." Such entry, once made, is not to be treated as a mere private memorandum of the officer, subject to be erased or changed by him at the solicitation of any person adversely interested. It is an official record, presumed to have been made upon sufficient showing and due investigation, and is by statute made evidence of the truth and correctness of the fact therein stated. For the purposes of this case it is immaterial whether the finding so made and entered by the treasurer might, upon proper trial, have been found to be a mistaken one. It was not for him to attempt to correct the mistake, if any was made. While the treasurer is, generally speaking, not a judicial officer, he is charged with some *quasi* judicial functions, and his finding and entry in this matter involve a finding from evidence which satisfied his own mind that the case was one of double assessment or taxation, and such finding, entered upon the appropriate books, constitutes a statutory record, which we think must stand until a court of competent jurisdiction shall adjudge it to have been erroneously made. He is not empowered to sit in review of his own acts done under statutory authority or direction.

The case of *People v. Wemple*, 144 N. Y. 478 (39 N. E. 397) is quite in point. There the comptroller, acting in ignorance of certain material facts, and having granted an order permitting a redemption from tax sale, was asked to reconsider his action, but refused, on the ground that he had no power to correct or change the order when once made. On certiorari this position was held to be sound, the court saying: "His action, so far as it was of a judicial character, was bounded and controlled by the strict and limited jurisdiction conferred by

the statute. That gave him no right to review his own orders and annul or vacate them except in the simple case of a cancellation of a tax sale. . . . But it is said that, since an officer acts judicially in granting the redemption, he has inherent power to vacate his own orders. I do not understand he has any power except such as the statute gives him. It is the general rule that officers of special and limited jurisdiction can not sit in review of their own orders or vacate or annul them." Any other rule, in cases like the one before us, would expose the landowner to great prejudice and loss without fault on his part, and without adequate remedy or redress.

The taxpayer is not to be charged with negligence simply because he relies upon information given him by the county treasurer with respect to the taxes he is required to pay; and, if he makes a timely and honest effort to pay such taxes, or to redeem his land from tax sale, and is misled by the conduct or mistake of said officer, a court of equity will grant him relief. *Corning v. Davis*, 44 Iowa, 622; *Henderson v. Robinson*, 76 Iowa, 603; *Hintrager v. Mahoney*, 78 Iowa, 537. The case at bar appears to come fairly within the equitable principles recognized and applied in our precedents. When the treasurer found that the sale was erroneous, and made entry of such finding upon the sale book, it necessarily had the effect to remove that tract of land from the list of those for which a deed could properly be issued, until at least such finding had been properly set aside or canceled by some competent tribunal. It follows that the tax deed should have been set aside by the trial court.

The record does not fairly disclose whether the defendant has paid any taxes upon the property pending this litigation for which he has an equitable claim to be reimbursed, but if there be any, his rights can be protected by the final decree.

2. SAME: negligence: equitable relief.



The decree appealed from is reversed, and cause remanded, for a decree in harmony with this opinion.—*Reversed.*

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FRANCIS J. McCULLOUGH and JULIA M. McCULLOUGH,  
v. MINNIE R. HOUAR, Appellant.

**Landlord and tenant: DISTURBANCE OF POSSESSION: DAMAGES.** A tenant can not offset against his rent a claim of damages by reason of the fact that the tenants of other apartments in the same building so conduct the same as to constitute a nuisance, where the landlord upon complaint did what he could to terminate the nuisance and caused the objectionable parties to vacate, and after making complaint the tenant paid rent without further objection.

*Appeal from Scott District Court.*—HON. J. W. BOLLINGER, Judge.

FRIDAY, OCTOBER 30, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE plaintiff brought this suit to recover rent due from the defendant. She counterclaimed for damages to her possession. There was a directed verdict for the plaintiffs, and the defendant appeals.—*Affirmed.*

*M. B. Gannon*, for appellant.

*Sharon & Donegan*, for appellees.

SHERWIN, J.—There is no controversy over the lease or over the amount of rent due thereunder. The contest arises solely on the defendant's counterclaim. She claimed that she had been disturbed in her possession of the premises by reason of disreputable lessees of another part of

the same building, and that damages thus occasioned should be paid by the plaintiff and constitute an offset to the amount of rent due. The facts are that the plaintiffs leased another portion of the premises to a Mr. Perkins, against whom no complaint is made. Mr. Perkins' term expired on the 1st of March, 1906, but in November, 1905, he wished to sublet the premises to a family by the name of Kelly, and to this plaintiffs consented after making some investigation as to the character of the Kellys. The Kellys went into possession under their contract with Mr. Perkins about the 1st of December, and remained there until the 15th or 20th of February following. Some time about the 1st of January a tenant by the name of Evans complained to the plaintiffs of the conduct of the Kellys and of people who frequented their rooms, whereupon the plaintiffs, or one of them, notified Mr. Perkins of this fact, and told him that he thought the Kellys undesirable tenants, and that they would have to move. Upon receiving this notice from the plaintiffs, Mr. Perkins notified the Kellys, and they, not desiring to move at that time, went with Mr. Perkins to the plaintiffs to try and satisfy them that they should not be disturbed. The plaintiffs did not take that view of the matter, however, and insisted that they would have to vacate the premises. The plaintiffs also made complaint of the Kellys to the police officers of the city. About the middle of January the defendant herein first made complaint to the plaintiffs, but she thereafter paid the rent due from her without further objection. As an inducement for the Kellys to at once vacate their premises, the plaintiffs released Perkins from his obligation to pay the February rent, and, in fact, never did receive any rent for that month. The facts which we have related appear undisputed in the record, and we think the court was fully justified in directing a verdict.

The real question in this case is whether the plain-

tiffs did anything which would have justified the defendant in leaving the premises. The lessee can not hold the landlord liable for injuries committed by a stranger, for the landlord is not bound to defend the premises against the wrongful acts of third persons. The record conclusively shows that the plaintiffs in this case, not only did not do anything themselves to disturb the quiet enjoyment of the premises by the defendant, but, on the contrary, it is shown that they did everything which could reasonably be done to terminate the nuisance that the defendant was complaining of; and that certainly is all that the law requires. Counsel for appellant rely upon *Boyer v. Com. Bldg. Investment Co.*, 110 Iowa, 491, but the case decides nothing contrary to what we have already said. It is there said that "the landlord, without being guilty of an actual, physical disturbance of the tenant's possession, may yet do such acts as will justify the tenant in leaving the premises. If he does not leave, yet he may have an action for damages."

The judgment of the lower court is *affirmed*.

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R. E. CAFFEE ET AL., Plaintiffs, v. N. J. BERKLEY, HENRY MYERS and JOHN THEE, Appellants, and CARBON PLASTER COMPANY, Defendant and Cross Petitioner.

**Corporations: ORGANIZATION: UNAUTHORIZED ACTS OF PROMOTERS:**

- 1 FRAUD. The promoters of a corporation occupy a fiduciary relation to the company and are required to act in the utmost good faith respecting any matter affecting the financial interests of the corporation, with the fullest disclosure of all the facts. Under this rule they can not purchase land on their own account as agents and sell it to the corporation at a profit unless the transaction is fully disclosed and consented to.

**Same: NOTICE OF FRAUD.** Where the promoters of a corporation  
 2 are acting in their own interest and antagonistic to the cor-

poration they represent, their knowledge of the transaction is not chargeable to the corporation.

**Same:** LIMITATION OF ACTION. An action against the promoters  
3 of a corporation to recover a secret profit derived by them at the expense of the corporation is solely cognizable in equity; and the statute providing that a cause of action for fraud shall not be deemed to have accrued until the fraud is discovered applies.

**Fraud:** NOTICE. While the means of acquiring knowledge of fraud  
4 is ordinarily the equivalent of actual knowledge, still knowledge of fraud incidentally acquired by the officers of a corporation when not acting in an official capacity is not notice to the corporation.

**Same.** The mere recording of a deed is not notice of the price  
5 paid for land unless there is some obligation to examine the record to ascertain the price paid.

*Appeal from Black Hawk District Court.*—HON. FRANKLIN C. PLATT, Judge.

TUESDAY, NOVEMBER 17, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE opinion states the case.—*Affirmed.*

*Hoxie & Brunn* and *Courtright & Arbuckle*, for appellants.

*Jesse Gouge* and *Edwards & Longley*, for appellees.

SHERWIN, J.—This is an action in equity to recover of the defendants, N. J. Berkley, Henry Myers, and John Thee, a secret profit which it is alleged they derived from the sale of land to the Carbon Plaster Company, a corporation promoted and organized by them. The Carbon Plaster Company and the plaintiffs asked the same relief. The court found the Carbon Plaster Company entitled to

an accounting and to a judgment against the defendants, N. J. Berkley, Henry Myers, and John Thee, for the sum of \$13,300, with interest at six percent per annum from January 11, 1901, and said defendants appeal.

The facts necessary to an understanding of the transaction out of which this action arose are substantially as follows: In April, 1900, the defendants, with some others, became interested in securing gypsum land near Ft. Dodge, Iowa, for the purpose of erecting a plaster mill and engaging in the manufacture of gypsum plaster. It was their plan to organize a corporation, and to purchase gypsum land and build a mill with capital that was raised by the sale of stock. Pursuant to this plan, an option was taken on what was known as the "Steiner land" at \$250 per acre. This option was not exercised, however, and in May the appellants procured an option on what was known as the "Woodworth Farm," of about one hundred and fifty acres, at \$130 per acre. After this last option was taken, the appellants and others employed by them for the purpose immediately began soliciting stock subscriptions for the proposed corporation, and met with fair success. Practically nothing was paid for this option, and it was given for only sixty days. When this time was about to expire, the stock had not all been subscribed for and the option was renewed. On August 29th, however, \$50,000 of the capital stock had been taken by the subscribers therefor, and on that day the stockholders met and selected a board of seven directors, two of whom were the appellants Berkley and Myers, and two of the others were W. P. Hoxie and C. F. Wichman, who had been assisting the appellants in promoting the corporation. On the 30th of August the said directors met and selected as officers the defendant Berkley as president, J. J. Emmert, vice president, C. F. Wichman, secretary, and the appellant John Thee as treasurer. On September 10th the books of account for the company were opened. The

proper stock entries were made and each subscriber was charged with the amount of his subscriptions, and these subscriptions were subsequently paid in full, except the amount subscribed by the appellants. September 19th the appellants closed the option by entering into a written contract by which they bound themselves to buy the Woodworth land at \$130 per acre. One thousand dollars in cash was then paid, \$3,500 was payable in stock of the corporation, and the balance was to be paid upon receiving complete title. Early in January, 1901, Berkley, Myers and Thee conveyed to the corporation the real estate in question for \$38,400, which sum was afterwards paid to them in full. \$13,159.60 of said sum was, in fact, paid in cash on the 15th day of January, which was before the appellants received a deed for the land from the Woodworths. The corporation also paid the 1900 taxes upon the land. In determining the amount which should be returned to the appellee by the appellants, the court allowed the appellants \$2,700 for expenses, and \$2,400 for the value of their services as agents and promoters of the corporation.

The evidence is very conclusive that the defendants Berkley, Myers, and Thee were the promoters of the Carbon Plaster Company, and that as such promoters and agents they occupied a fiduciary relation to said company, which required of them the utmost good faith and the fullest disclosure of every matter concerning the financial interests of said corporation. *Hinkley v. Pipe Line Co.*, 132 Iowa, 396; *The Telegraph v. Loetscher*, 127 Iowa, 383. That they took an option on the land in question for the corporation which was afterwards organized and subsequently acquired the title thereto for the corporation is established by facts and circumstances which can not be explained away. Being the agents and trustees of the corporation, they could not purchase on their own account and sell to the corporation at an enlarged price, unless

1. CORPORATIONS:  
organization:  
unauthorized  
acts of pro-  
motors: fraud.

the corporation had the fullest and most complete knowledge of the transaction and consented thereto. *Hinkley v. Pipe Line, supra*; *The Telegraph v. Loetscher, supra*; *Iler v. Griswold*, 83 Iowa, 442; *Merrill v. Sax*, 141 Iowa, 386.

That the Carbon Plaster Company had no actual knowledge that the appellants bought the land for \$130 per acre is practically undisputed, unless it be said that the knowledge of the promoters and their agents who were members of the board of directors was the knowledge of the corporation. But their action in the matter was in their own interest and antagonistic to the interest of the corporation which they represented. Hence the corporation is not charged with their knowledge. *Hummel v. Bank of Monroe*, 75 Iowa, 689; *Faust v. Hosford*, 119 Iowa, 97. It is also true that, with two or three exceptions, none of the stockholders other than the appellants knew that the appellants were expecting to make a profit on the land. And, indeed, we think the weight of the testimony shows that the appellants represented to many of the stockholders that they were making no profit on the land at \$250 per acre, the price paid by the corporation.

It is conceded by the appellee that this action was commenced more than five years after the cause of action accrued, and that it was barred, unless within one of the exceptions to the operation of the statute of limitations. Code, section 3448, provides one of the exceptions relied upon by the appellee, and it is as follows: "In actions for relief on the ground of fraud or mistake. . . . the cause of action shall not be deemed to have accrued until the fraud . . . complained of shall have been discovered by the party aggrieved." This section has often been construed to apply to a cause of action on account of fraud such as was, theretofore solely cognizable in chancery.

2. SAME: notice  
of fraud.

3. SAME:  
limitation  
of action.

*Daugherty v. Daugherty*, 116 Iowa, 245. And the appellants contend with great ability and earnestness that this case does not fall within the exception, because the relief prayed herein could have been granted as well in a law action. The contention can not, however, be sustained. In *Faust v. Hosford*, *supra*, the question is settled adversely to appellants' claim. We there said: "On account of the fiduciary relations existing between defendant and plaintiff, and the alleged fraud, this action was heretofore solely cognizable in a court of equity. Hence the statute . . . (Code, section 3448) applies." See, also, *Blakeney v. Wyland*, 115 Iowa, 607. In *Daugherty v. Daugherty*, 116 Iowa, 245, relied upon by appellants, there was no fiduciary relation, and it was expressly so stated. That case is not therefore controlling here. Fraudulent concealment is the same as active fraud in cases of this kind, and, where the fiduciary relation exists, mere silence upon the part of the agent or trustee is fraudulent concealment, and will be deemed as continuing to avoid the statute of limitations. *Faust v. Hosford*, *supra*; *Telegraph v. Loetscher*, *supra*; *Wilder v. Secor*, 72 Iowa, 161. In this case it is not necessary to rely solely on the rule above stated, because as we heretofore said, there is sufficient evidence of active fraud to sustain the allegations of the petition.

But appellants urge that, even if fraud be shown, the appellee was charged with knowledge thereof because of its means of acquiring such knowledge. It may be conceded that ordinarily means of knowledge

4. FRAUD:  
notice.

will be held equivalent to actual knowledge.

But notice to or knowledge by an agent who is acting in hostility to his principal is not notice to the principal, as we have heretofore shown. Nor is knowledge incidentally acquired by officers of a corporation when they are not acting officially notice to the corporation. *Keenan v. Insurance Co.*, 13 Iowa, 375; 10 Cyc. 1062; 2



Purdy's Beach on Corporations, 1160; Thompson on Corporations, sections 5219, 5221; 1 Morawetz on Private Corporations, sections 540b, 540c.

The only other ground upon which the appellants seek to charge the appellee with knowledge is the information as to price contained in the recorded deeds from the Wood-

worths to them. The simple recording of  
s. SAME.

he deeds did not, however, operate as constructive notice of the price paid for the land; and, unless there was some obligation on the part of the appellee to examine the record for the purpose of learning the true price paid therefor, the law will not charge it with knowledge thereof. It was the duty of the appellants to make truthful and full statements regarding the transaction, and the corporation and its stockholders had the right to believe, and to act on such belief, that they had done so. The appellee was not, therefore, compelled to search records for the purpose of ascertaining the truth or falsity of the representations made, or to determine whether its agents had fraudulently concealed from it a material matter. *Osgood v. King*, 42 Iowa, 478; *Wilder v. Secor*, *supra*; *Faust v. Hosford*, *supra*.

The judgment of the district court is clearly right, and it is therefore *affirmed*.

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A. J. McCLURE v. GREAT WESTERN ACCIDENT ASSOCIATION, Appellant.

**Accident insurance: NOTICE AND PROOF: SPECIAL FINDING: INCONSISTENCY.** Notice and proof of injury, that an insured was on a railroad track when struck by a train and injured, are not inconsistent with a special finding that he was crossing a track on a public highway and entitled to recover the full amount of his indemnity, although the policy provided a smaller indemnity for injuries received while on the roadbed of a railroad, except while crossing at a public highway.

**Same: PROOF OF INJURY: WAIVER.** Where the answer in a suit on an  
2 accident policy admits the waiver of any further proof of injury, no additional proof can be insisted upon however inadequate that made may be.

**Same: INJURY WHILE UPON RAILROAD TRACK: BURDEN OF PROOF.**

- 3 Where an accident policy provides for less indemnity in case of injury while on the roadbed of a railroad, except when crossing at a public highway, the burden is on the insurer to show that the accident occurred at a place not in a public highway, and this burden is not shifted by a simple showing that the accident occurred upon a railroad track, thus requiring insured to show that it happened at a highway crossing; and the burden is on the insurer to show that the accident was the result of voluntary or unnecessary exposure to danger.

**Same: LIMITATION OF RIGHT OF ACTION: GROUNDS OF RECOVERY:**

- 4 **AMENDMENT: PLEA IN BAR.** Although an accident policy provides that no action shall be maintained unless brought within six months after termination of disability or after the injury assumes a permanent character, still the petition in an action brought more than six months after the injury, on the theory that it was of a permanent character, may be amended so as to claim recovery for a temporary injury; and proof that insured is gradually improving and likely to recover will support a finding that the injury had not assumed a permanent character, and thus a plea of the contract in bar of the action will be avoided.

**Admissions: PLEADINGS AS EVIDENCE OF.** Pleadings which have been  
5 superseded may be offered in evidence for the purpose of establishing admissions of the party, but such evidence is not conclusive and when explained may go to the jury for what it is worth.

**Depositions: WAIVER OF OBJECTION.** A party who acquiesces in the  
6 offer of a deposition in evidence waives any objection there might have been to the custody, preservation and notice of filing the same.

**Accident insurance: WEEKLY BENEFITS: COMPUTATION.** Where the  
7 by-laws of an accident association provided that weekly benefits should not mature until a stated time after the filing of satisfactory proofs, and it admitted waiver of such proofs, liability for the benefits should be computed from the date of waiver.

*Appeal from Lucas District Court.*—HON. FRANK W. EICHELBERGER, Judge.

TUESDAY, NOVEMBER 17, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION on accident insurance policy resulted in judgment as prayed. The defendant appeals.—*Affirmed* on condition.

*Bailey & Stipp* and *Dungan & Aten*, for appellant.

*W. W. Bullman* and *Jno. A. McKenzie*, for appellee.

LADD, C. J.—The insured had gone to the post office to mail a letter, but, upon ascertaining that the mail had been sent to the train, proceeded past the Bates House to the railway, where he took a well-beaten path between the main tracks to go to the depot. After having gone a short distance, he noticed a freight train coming down the east track, and also a cloud of steam and smoke. His testimony was to the effect that he remembered having a purpose of getting out of the way of these, and then all was blank. Mrs. Shelton testified that she saw him “just behind the caboose of a freight train passing on the east track and ahead of a passenger coming the opposite direction” on the west track; that she “saw him again just as he was crossing the last rail west,” and then on the ground after the collision; that he was thirty or forty feet behind the caboose, and was crossing the tracks “at the public crossing that crosses the tracks . . . where the public highway crosses the railway.” Her testimony was not adduced on the former trial, and the only issue determined in this court was that the place of the injury was on the roadbed. 133 Iowa, 224. Upon remand a sub-

stituted petition was filed in which recovery for weekly benefits was demanded, and, on the evidence then introduced, the jury found in answer to a special interrogatory and necessarily by the verdict that plaintiff was crossing on a highway when injured. The defendant's policy provided for an indemnity of \$15 per week to be paid plaintiff, not exceeding two hundred weeks, in event of injuries resulting from accident "immediately, continuously, and wholly disabling the injured from performing any and every kind of duty pertaining to his occupation." Should the injury be received because of "unnecessary or voluntary exposure to obvious danger" or "while on the roadbed or bridge of any railway company, except while crossing at a public highway [except railway employees while in the regular discharge of ordinary duties], then the weekly benefits shall be one-fifth of the amount provided in this contract and for a total period not exceeding ten weeks."

Appellant says that the contention that he was crossing at a highway was inconsistent with the notice of the accident and proofs of loss furnished the association. In

1. ACCIDENT INSURANCE: notice and proof: special finding: inconsistency.

the notice it was said that he was injured when walking on the railroad track, and was struck in the back by an engine. But it conclusively appears that plaintiff had nothing to do in writing or sending this notice. In the proofs of loss it is stated that he was on the railroad track and was struck by a train of cars. Neither this nor the notice is necessarily inconsistent with the finding that he was crossing the highway at the time. Nor is there anything in the original petition inconsistent therewith. Indeed, there is no dispute but that he was walking on the roadbed when struck by the engine. The controversy is as to whether he was then crossing the roadbed in a highway, and enough has been said to indicate that the verdict so finding is supported by the evidence. It was conceded that plaintiff received the injuries while

on the roadbed, and this was all the notice of the accident and proofs of loss furnished the defendant asserted. The same is true of the original petition, and the contention that these are inconsistent with the above answer to the special interrogatory is without foundation.

Nor is there any basis for the argument that there was no waiver of the proofs of loss for the answer definitely admits "that defendant waived any further or ad-

2. SAME: proof  
of injury:  
waiver.

ditional notice or proof of said injury or loss." Possibly plaintiff's attitude on the last trial may have been somewhat inconsistent with the alleged making of such proofs, but this does not obviate the force of the admission, for, no matter how inadequate those given, the answer concedes the waiver of anything additional which might have been required.

II. The policy and by-laws provide that, if the accidental injuries were "received while on the roadbed or bridge of any railroad company, except while crossing at a public highway," the indemnity should be

3. SAME: injury  
while upon  
railroad track:  
burden of  
proof.

for one-fifth of the amount stipulated in the contract and for one-twentieth of the time, and the court in the fourth instruction told the jury that the burden of proof was on defendant to show that plaintiff was on the roadbed, and not on a highway crossing. Appellant insists that, though the burden of proof was on defendant to show that the accident occurred on the roadbed of a railway, when this appeared, such burden shifted to plaintiff, and rested on him to prove that it happened while crossing a public highway. In other words, defendant having proved the exception, plaintiff must establish the exception to the exception. The trouble with this contention is that the last supposed exception is but a limitation on the first, and the defendant is only relieved from the larger liability when the accident occurs on the roadbed elsewhere than in crossing over a highway. Indeed, several courts have held that

this limitation is implied, even though no mention is made of the insured crossing the track where travelers have the right to be. Thus, if he necessarily crosses to take a train or reach a station, this is not within the exception; *DeLoy v. Travelers' Ins. Co.*, 171 Pa. 1 (32 Atl. 1108, 50 Am. St. Rep. 787); *Duncan v. Preferred Mut. Acc. Ass'n*, 59 N. Y. Super. Ct. 145 (13 N. Y. Supp. 620; *Id.*, 129 N. Y. 622, 29 N. E. 1029), or if he is carefully crossing the track on a well-recognized thoroughfare to and from the station; *Payne v. Fraternal Acc. Ass'n*, 119 Iowa, 342. See, also, *Dougherty v. Pacific Mut. Life Ins. Co.*, 154 Pa. 385 (25 Atl. 739). The object of the exception is not to guard against injury from a defective roadbed, but against dangers incident to the operation of trains thereon. The condition is no more than an assurance or warranty that he will not intrude upon that part of the roadbed which is not also a part of the highway or public thoroughfare, and only upon a showing that he has done so, and in so doing the injury was received, does the exception apply. Manifestly, then, the instruction was correct, as was also another placing the burden of proof on defendant to show that the injury was received because of voluntary or unnecessary exposure to danger. *Payne v. Ass'n, supra*.

III. The policy provides that no suit shall be maintained upon it "unless commenced . . . within six months next after the disability for which claim is made either terminates or assumes a fixed and permanent character." The court instructed the jury that the action must be regarded as having been commenced at the time the substituted petition was filed, August 17, 1907, and that, if this was more than six months after the injury had assumed a fixed and permanent character, the verdict should be for defendant, but, if six months had not elapsed since it had assumed such character, if it

4. SAME:  
limitation of  
right of ac-  
tion: grounds  
of recovery:  
amendment:  
plea in bar.

had so become, then the finding should be for plaintiff on this issue. The record leaves no doubt but that the disability was thought for a long time to have been of a permanent character, but both plaintiff and his wife testified that he was gradually improving in health, and a physician, after an examination, expressed the opinion that in time he would recover. This certainly justified the jury in finding that the injury had not assumed a fixed and permanent character. Quite naturally appellant criticises this change in the attitude of plaintiff as made to meet emergencies; but the suggestion was for the consideration of the jury only, to be accorded such weight as might seem proper.

It is also urged that the substituted petition asserted the permanent character of the injuries. If so, this was withdrawn by a subsequent amendment thereto, distinctly averring that his disability was not permanent and that he was gradually recovering.

It is said, however, that notwithstanding this the former allegation stood as a solemn admission in the case, and in support of this *Mulligan v. Railway*, 36 Iowa, 181, is relied on. In so far as so holding, that decision has been overruled. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117 Iowa, 157; *Longley v. McVey*, 109 Iowa, 666; *Burns v. Railway Co.*, 110 Iowa, 385; *Leach v. Hill*, 97 Iowa, 81; *Shipley v. Reasoner*, 87 Iowa, 555. Pleadings when superseded by others, may be introduced in evidence, but only as showing admissions of the adverse party, and, as these have been solemnly made, are often entitled to much weight. They are not conclusive, however, and, when explained or contradicted, go to the jury for only what they are worth. The finding against the plea in bar is supported by the evidence.

IV. The trial began September 7, 1907, and on the afternoon of that day the deposition of M. E. Shelton was

5. ADMISSIONS:  
pleadings as  
evidence of.

read in evidence down to the seventh interrogatory. An objection being interposed, the farther reading was suspended, and two days later the answer and remaining interrogatories and answers were read to the jury without objection. On the next day, and after a motion to direct 'a verdict for defendant had been overruled, it moved that the deposition of Mrs. Shelton be suppressed and withdrawn from the jury on several grounds, among others that although filed September 4, 1907, no written notice thereof had been served on defendant or its attorneys, that it was withdrawn from the files without leave of court or consent of defendant and by them retained until offered in evidence and that certain changes and interlineations appear therein which are unexplained. The motion was overruled, and rightly so. Even if it be conceded that sections 4707 and 4711 of the Code had not been observed, this was waived by allowing the reading of the deposition to the jury without objection. No reason for not interposing timely objections appears, and the court did not abuse its discretion in not entertaining a motion to suppress after argument to the jury had begun. A party can not acquiesce in the introduction of evidence, and then predicate error on a refusal thereafter to withdraw it.

6. DEPOSITIONS:  
waiver of  
objection.

V. The substituted petition was filed August 17, 1907, and this was treated by the court in the instructions as the beginning of the action for weekly indemnity. Under the by-laws the obligations to pay weekly benefits did not mature until ninety days after satisfactory proofs were filed.

7. ACCIDENT  
INSURANCE  
weekly bene-  
fits: compu-  
tation.

The answer admits waiver of such proofs, and so the period must be computed from the date of such waiver. *Blood v. Hawkeye Ins. Co.*, 103 Iowa, 728; *Quinn v. Capital Ins. Co.*, 71 Iowa, 615. As ninety days must have elapsed prior to the beginning of the action in order to mature the obligation to pay the weekly install-



ment immediately prior thereto, recovery may only be had on that and previous installments or for one hundred and fifty weeks at \$15 per week, instead of one hundred and sixty-four weeks as allowed under the instructions of the court. To this should be added interest at the rate of 6 percent per annum on each weekly installment from its maturity to the time of the trial, and the total amount will be the verdict which should have been returned. Upon the filing of a remittitur of the excess over such amount, the judgment will be affirmed; otherwise reversed.—*Affirmed* on condition.

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ZIMBELMAN, & OTIS, Appellees, v. R. L. FINNEGAN,  
Appellant.

**Bill and notes:** CONSIDERATION: DIRECTION OF VERDICT. A promissory note imports a consideration, and where there was no evidence of want of consideration and plaintiff had shown that defendant executed and delivered the note as his individual obligation, the question of his liability was for the jury.

**Same:** PLEADING. The plaintiff in suing upon a note is not required to plead a consideration for the instrument; nor is he required to state it in reply to defendant's plea of want of consideration.

**Same:** EXECUTION: AGREEMENT OF PARTIES. An agreement between the parties that it was not to become binding on the maker until signed by others must be mutual, for if the agreement was that of one only it would not bind the other.

**Bills and notes:** CONSIDERATION. Extension of time of payment to the principal debtor; acceptance of a note as security for a debt or forbearance to sue upon present claims; or a note given for the debt of another with an agreement express or implied to extend the time of payment is sufficient consideration for the note; so that where a park association purchased lumber of plaintiff and being unable to pay, the defendant, a stockholder and secretary of the association, gave his note therefor payable in one year, either as his individual obligation or to be signed by other stockholders also, and thereafter

the association was not regarded as a debtor, or, if a debtor, the time of payment was extended, the note was supported by a consideration.

**Same:** STATUTE OF FRAUDS. Where a promissory note was executed 5 in consideration of the extension of the time of payment of the debt of another, and the only question in dispute was the sufficiency of the consideration, the statute of frauds was not involved.

**Same:** EXTENSION OF PAYMENT: IMPLIED AGREEMENT. The circumstances in the instant case are held sufficient to support an implied agreement by the creditor to extend the time of payment of the debt of another upon the execution and delivery of the note in suit.

*Appeal from Boone District Court.*—HON. C. G. LEE,  
Judge.

THURSDAY, NOVEMBER 19, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION at law upon a promissory note. Defenses, want of consideration, and some other matters, which will be noticed in the body of the opinion. Trial to a jury, verdict and judgment for plaintiffs, and defendant appeals.—*Affirmed.*

*Dyer & Hull*, for appellant.

*G. W. Crooks* and *Harpel, Creighton & Cederquist*, for appellees.

DEEMER, J.—The action is upon a promissory note for \$749.12, dated November 27, 1903, due on or before one year after date, drawing 8 percent interest, payable to plaintiff and signed by defendant. There was a credit thereon, under date April 17, 1905, of \$280, received for the sale of a building and fence. Defendant averred that

it was never delivered with intent to make it a binding obligation, that others were to sign before it was to become effective, and that there was no consideration for the note. These were the issues upon which the case was submitted, with the result above indicated. At the conclusion of plaintiff's evidence defendant moved for a directed verdict. This motion was overruled, and of this complaint is made. It is also contended that the verdict is without support in the evidence, and some of the instructions are challenged.

The argument has taken a rather wide range, and much is said in the briefs regarding the statute of frauds which we do not think is in any manner involved. The testimony tended to show the following with reference to the execution of the notes: Plaintiff is a copartnership, engaged in the retail lumber business at the city of Boone, and defendant was a stockholder and the secretary of what was known as the "South Side Driving Park Association" in said city. As such officer he ordered a bill of lumber from plaintiff for the driving park association, which bill was delivered to the association. The amount of this bill was \$749.12. After the bill was furnished, one of the members of plaintiff firm called on defendant to pay the bill. Defendant said there was no funds with which to pay it, and plaintiff then insisted that defendant make his note for the amount of the lumber bill. The note in suit was accordingly drawn up, signed by defendant, and delivered to Zimbleman, a member of the plaintiff firm. It was then suggested, by one or the other of the parties, that other stockholders of the driving park association should sign the note, and the testimony on the part of the plaintiff is that defendant was to procure the signatures. Zimbleman secured the note from defendant in order to straighten out the account, as he (Zimbleman) was about to leave the State to be gone several months. The note, after delivery to Zimbleman, was left with Otis,

the other member of the firm, and defendant was told that he might procure it at any time from Otis to get such signatures as he (defendant) desired to have with him on the note. Finnegan got the note from Otis to obtain other signatures, and it remained with him for about four months. Not having been returned, Otis went to defendant about it, asked if he had obtained the other signatures, and, being informed that he had not, claims that defendant then surrendered the note as his independent obligation. After the note was executed defendant on several occasions asked for time on the note, hoping that the driving park association would be able to pay the bill, but it never became able to do so, and just before the expiration of the time for foreclosing the mechanic's lien, plaintiff demanded payment of the note, and it was then agreed that the mechanic's lien should be foreclosed, and the amount realized thereon credited upon defendant's note. This was done, and the credit appearing upon the back of the note represents the net amount realized on the foreclosure.

Defendant introduced testimony to the effect that the note was not to be binding as his sole and individual obligation, but that the agreement was that the note should be signed by all the stockholders of the driving park association, some ten or twelve in number, before it would be binding, and that he (defendant) was simply "to start the note out"; that the note was never signed as agreed, and never became a binding obligation. He further testified that he received no part of the consideration for the note, although he admits that he signed the same because of Zimbleman's statement to him that the driving park association account had to be fixed up. In substance, this is the material evidence in the case, and in view thereof the trial court gave the following instructions to the jury:

If you believe from the evidence that the defendant delivered the note in suit to plaintiff, under an agreement that he was signing the same as one of the stockholders of the South Side Driving Park Association, and that the same was to become binding only upon condition that other stockholders of said association should sign the same, then plaintiff can not recover in this case. Or if you believe from the evidence that there was no consideration for said note, then the plaintiff can not recover. The only claim of consideration in the pleadings is that said note was given for the purpose of securing an extension of time for the South Side Driving Park Association, and you are told that, if this was the consideration, it was sufficient. The note, being a written instrument, and in the possession of plaintiff, purports a delivery and a consideration, and the burden is upon the defendant to show, by a preponderance of the evidence, either that there was no delivery or no consideration. On the other hand, if you believe that the defendant was a stockholder and officer of the South Side Driving Park Association, and that said association was without funds, and in order to extend the time of payment of said claim, and prevent the plaintiffs from immediately enforcing their claim against the South Side Driving Park Association, the defendant delivered the note to the plaintiffs, intending the same as his obligation, but that it was understood and agreed that the defendant might have the privilege of securing other names to share the liability, then the note would be a binding obligation upon him, and the plaintiff would be entitled to recover. You are told that if the defendant delivered the note to the plaintiffs without an agreement that other names should be secured to the same before it should be binding, then the law presumes he intended it as his own obligation.

Contention is made that the trial court was in error in not sustaining defendant's motion for a directed verdict. At the time this motion was filed plaintiff had introduced the note, and had also shown that it had been delivered as defendant's individual obligation. The note being in writing, a consideration was imported; and, in

the absence of proof from defendant, the case should have gone to a jury upon the testimony then adduced. The only witness offered down to that time testified that defendant delivered the note as his independent obligation. There was no error in overruling the motion to direct a verdict for defendant.

II. The fifth and sixth instructions above quoted are challenged. Of the fifth it is said that there is no basis for it, either in the pleading or the evidence. Plaintiff was not required, in the first instance, to plead any consideration for the note. That was presumed. In response to defendant's plea of no consideration plaintiff was not bound to state the consideration. There was, as we have seen, evidence as to a consideration for the note. There is no justification for the claim that defendant's view of the case was not presented to the jury by this fifth instruction.

The sixth instruction is challenged because it omits to state that, if the parties understood the note was not to become binding upon defendant until others signed, it would not be a valid obligation. There is no merit in this position. If there was an understanding it must have been based upon an agreement of the parties, and if there was an understanding by either not based upon an agreement, it would not be binding upon the other.

III. Next it is argued that the verdict is without support in the testimony. From the testimony already quoted it was manifestly a question for the jury to determine whether or not the note should become a binding obligation until others had signed with the defendant. On that issue there was a finding for the plaintiff, and it is not our province to interfere.

The most troublesome question in the case is the issue of want of consideration for the note. That an ex-

1. **BILLS AND  
NOTES:** consid-  
eration: direc-  
tion of verdict.

2. **SAME:**  
pleading.

3. **SAME:**  
execution:  
agreement  
of parties.

tension of time to the principal debtor is a sufficient consideration is well established. The receipt of a note as security for a debt or forbearance to sue upon a present claim or debt, or the giving of an extension of time to an imputed debtor, will be sufficient to enforce the maker's obligation. Daniel, *Negotiable Instruments*, section 183; *Wormer v. Waterloo Works*, 50 Iowa, 262. And so if goods be furnished by A. to B. at the request of C., it is a good consideration for a note of C. to A. *Atherton v. Marcy*, 59 Iowa, 651. Moreover, a debt due from a third person is a good consideration for a note from a maker to the creditor, provided there was either an express or implied agreement for an extension of time. *Mansfield v. Corbin*, 2 Cush. (Mass.) 151. An agreement will be implied if the debt is then due, and the note is made payable at a future day. *Thompson v. Gray*, 63 Me. 228; *Fulton v. Loughlin*, 118 Ind. 288 (20 N. E. 796); *Yeatman v. Mattison*, 59 Ala. 382. Now the evidence shows without any dispute that, when the lumber was delivered pursuant to a sale, which was presumptively for cash, the driving park association had nothing wherewith to pay the account, and that to settle and adjust the same the note in suit was made, either as the obligation of defendant alone, or to be signed by others, that this note was due on or before one year from date, thus giving defendant one year at his option to pay the same, and that thereafter the driving park association was not regarded as a debtor, or, if a debtor, the time for the payment of its account was extended. Under well-known rules this constituted a sufficient consideration for the note.

Defendant's counsel has much to say in this connection regarding the statute of frauds, which, as we have already indicated, is not regarded as germane. The promise here is in writing, is admitted by defendant, and is not within

4. **BILLS AND  
NOTES:**  
consideration.

5. **SAME:** statute  
of frauds.

the statute of frauds. The only questions involved were those submitted by the trial court in its instructions.

Appellant's counsel argue, however, that there is no testimony to sustain the claim that the time for the payment of the lumber bill was extended, and they cite, and rely with great confidence upon, *J. H. Queal*

6. SAME: extension of payment: implied agreement. *& Co. v. Peterson*, 138 Iowa, 514. But that case is not controlling. It does not hold

that an agreement to forbear may not be implied from circumstances. It is authority simply for the proposition that from forbearance alone without more an agreement to forbear will not be implied. But that there may be an implied agreement from such circumstances as are shown in this case is abundantly established by the authorities. See those heretofore cited, and *Boyd v. Freize*, 5 Gray (Mass.) 553. It is important, in this connection, to remember defendant's relations to the driving park association, and that he in fact placed the order for the lumber, and at various times secured an extension of the time for the payment of the bill. There was enough testimony to support the verdict, and we discover no error.

The judgment must therefore be, and it is, *affirmed*.

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JOHN VAUPEL, Appellee, v. JOHN MULHALL, Appellant.

**Fraud: MISREPRESENTATION IN SALE OF LAND: INSTRUCTIONS.** Where  
1 the evidence for plaintiff in an action for false representation in the sale of land tended to show that the farm sold was of irregular shape and contained but about sixty acres of tillable land, with a much larger quantity rough and unfit for cultivation; that it surrounded on three sides tillable land of another; that defendant represented his land as containing two hundred and twenty acres of tillable land and pointed out that of the other as a part of his own, a charge that if defendant with intent to defraud pointed out the land of the other and represented it to be his own, and his farm with the other contained two



hundred and twenty acres of good farming land; or, if without pointing out the land of the other he falsely stated that his own farm contained that quantity of tillable land he could recover, did not present inconsistent theories, as the gist of the fraud charged consisted in the false statement as to the acreage of his own farming land, and the pointing out of the other land was not an essential element in plaintiff's case, although competent evidence of the fraud.

**Same: EVIDENCE: VALUE OF PROPERTY TAKEN IN EXCHANGE: DAMAGES.**

- 2 In an action for false representations in the sale of land, where the consideration therefor was in part an exchange of other property, and there was a conflict in the evidence as to whether the false representations were made, and the plaintiff pleaded and testified to the alleged consideration paid by him, the defendant was entitled to show the actual value of the property taken in exchange; and such evidence of consideration should be considered with that of plaintiff, not only on the question of whether defendant relied on the alleged representations, but as to whether they were in fact made; and this rule would not affect the amount of plaintiff's damages, as he could show the value of the land if it had been as represented and recover on that basis.

*Appeal from Woodbury District Court.*—HON. J. F. OLIVER, Judge.

THURSDAY, NOVEMBER 19, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

ACTION for damages for false representations in the sale of land. Verdict for plaintiff for \$13,000. Judgment on the verdict for \$7,000, plaintiff remitting. Defendant appeals.—*Reversed and remanded* for a new trial.

*Milchrist & Scott*, for appellant.

*Robert Munger, J. W. Hallam and Stearns & Zipf*, for appellee.

EVANS, J.—At the time of the transactions involved

in this action, the plaintiff was a merchant of Freeport, Ill., and the defendant was a dealer in real estate at Sioux City, Iowa. The plaintiff was desirous of purchasing real estate, and of paying therefor, in part, with goods to be selected by him from the shelves of his store at Freeport. He called at the office of the defendant at Sioux City for the purpose of ascertaining what he had for sale. The defendant sent one Casselman with the plaintiff and his son to see the farm in question. This farm is known in the record as the "Fisher farm," and is located in Monona County, and was then occupied by Fisher with his family, although he had recently sold it to the defendant. This farm consisted of three hundred and thirty-four acres, and was somewhat irregular in shape. Its extreme length was about a mile and a half, lying east and west. Its greatest width one hundred and sixty rods, and its minimum width eighty rods. It lay somewhat in the form of an open monkey wrench. In the open mouth of the wrench was a smaller farm, known as the "Erskine farm," being surrounded on three sides, namely, the west, north and east, by the Fisher farm. Substantially all of the east half of the Fisher farm and the west end of the other half consisted in rough, hilly, broken ground, and unfit for cultivation. Between these extremes there lay about sixty or sixty-five acres of level bottom land, fit for cultivation. Joining this bottom land on the south, and divided from it by an east and west highway, lay the Erskine land, which was also bottom land, and fit for cultivation. To the west and to the east and to the northwest and to the northeast of this Erskine land lay the hilly, rough ground of the Fisher farm. The Fisher house was located upon the east and west highway, which separated the Erskine land from the bottom land on the Fisher farm. This house faced toward the south, and toward the Erskine land. The evidence on the part of the plaintiff tends to show that on the day in question

Casselman represented to him that the Fisher farm contained two hundred and twenty acres of good bottom land, fit for cultivation, and that the balance consisted of hilly, untillable land. In order to reach the Fisher place, the parties drove over a private driveway running north through the Erskine farm and opening into the highway near the Fisher house. While passing through the Erskine farm, Casselman, pointing his hand over the Erskine farm, said, in substance, "This is the land." The parties drove to the Fisher house. More or less of an inspection was had by the plaintiff, to the extent, at least, that he looked over the ground, which he supposed to be the two hundred and twenty acres of good bottom land. He did not pass over the whole farm, nor leave the Fisher house for any considerable distance; nor did he ascertain the boundaries of the land. He believed, however, that the Erskine land to the south of the highway was part of the farm, and believed the statement of Casselman that there were two hundred and twenty acres of good bottom land, and, so relying, he purchased the farm at a consideration, expressed in the contract, of \$65 per acre, and paid for the same. After the purchase of the farm he discovered that it contained not more than sixty or sixty-five acres of good bottom land, and that the farm as a whole was worth not more than about \$30 or \$32 an acre. His evidence tends to show, also, that it would have been worth \$65 per acre if it had contained two hundred and twenty acres of good bottom land as represented. The evidence on defendant's part tends to show as follows: That no representations of any kind were made; that the Erskine farm was not pointed out as any part of the Fisher farm; that the farm would not have been worth \$65 an acre if it had contained two hundred and twenty acres of bottom land; that the plaintiff did not pay \$65 an acre therefor; that although the contract expressed the consideration at \$65 per acre, it was also a part of the contract that it was

to be performed, in large part, by an exchange of goods, to be selected by the plaintiff himself from the shelves of his store; that he paid for said farm only \$10,000 in money, and \$11,710 figured at the original invoice value of shelf-worn goods, which were worth, in fact, not more than ten or fifteen cents on the dollar. The evidence on defendant's part also tends to show that the farm, in the condition it actually was, was worth all the value which plaintiff paid for it. Plaintiff's evidence in rebuttal tended to show that the goods turned out by him in partial payment for the farm were worth from eighty to eighty-five cents on the dollar.

I. The court charged the jury, in substance, in instruction No. 6 that, if Casselman, with the intention to deceive and defraud the plaintiff, pointed out to him the

1. FRAUD: mis-  
representations  
in the sale  
of land:  
instructions. Erskine land, and represented it as being a part of the Fisher farm, and that the Fisher farm, as so pointed out and shown to plaintiff, contained at least two hundred and twenty acres of good farm land, or if, without pointing out the Erskine land, the said Casselman falsely and fraudulently represented to the plaintiff that the Fisher farm contained two hundred and twenty acres of good farming land, located upon the bottom, and excellent for cultivation and the raising of crops, and that such representations were false, and known by Casselman to be false, and the falsity of such representations was not known by plaintiff, but that he believed and relied upon such representations, and, so believing and relying, purchased the farm in question, then he was entitled to recover. The appellant contends earnestly that this instruction submits the case to the jury on two inconsistent theories, and that, if the plaintiff relied upon one representation, he could not have relied upon the other. It is urged that, if the plaintiff has failed to prove that Casselman pointed out to him the Erskine land as part of the Fisher farm, his case must

fail, because he has testified that he relied upon that representation. The argument is not sound. Suppose it had been found as a fact in the case that Casselman had not represented the Erskine land to be a part of the Fisher farm, but that he had represented the Fisher farm to contain two hundred and twenty acres of good bottom land. The plaintiff was upon the ground. He looked about him to see the general character of the bottom land. The Erskine land was close at hand and in plain view. If he looked for approximately two hundred and twenty acres of bottom land, his eyes must have rested upon the Erskine land as a part of it, for there was no other bottom land in sight sufficient to make approximately the number of acres represented to him. If, therefore, by any false representation, knowingly made by Casselman, the plaintiff was induced to believe that the Erskine land was a part of the Fisher farm, then he would not be precluded from relying upon such belief, simply upon failure to prove that the Erskine land was expressly pointed out to him as a part of the farm. The essence and material part of plaintiff's case is that Casselman falsely and knowingly represented the Fisher farm to contain two hundred and twenty acres of good bottom land, fit for cultivation. If that charge is proved by whatever proper evidence, plaintiff's case is made in that respect.

Plaintiff testified that Casselman expressly pointed out to him the Erskine farm, and it was proper evidence tending to prove the essential charge. If he failed to satisfy the jury that express representations were made as to the Erskine land, the jury might still find that he saw the Erskine land, and believed it to be a part of the Fisher farm, because of Casselman's representations that there were two hundred and twenty acres of such bottom land included in the farm. And such belief on his part would warrant the jury in finding that he relied upon Casselman's representations as to the two hundred and

twenty acres. If, after hearing such representations from Casselman, it was plainly obvious to him that the farm did not contain two hundred and twenty acres of bottom land, or approximately so many acres, then he would not be justified in believing or relying upon such false representations. On the other hand, if he saw two hundred and twenty acres of bottom land in plain view, the jury could justify him in believing that sufficient of such bottom land was included in the farm to make Casselman's representation good. We are of the opinion, therefore, that there was no inconsistency in the instruction complained of, nor in the two theories submitted to the jury therein.

II. The plaintiff alleged in his petition that, by reason of such false representations, he was induced to pay for said land at the rate of \$65 per acre, being the total sum of \$21,710. This allegation was put in

2. SAME: evidence: value of property taken in exchange: damages.

issue by defendant's general denial. Plaintiff testified that such was the price he paid. The evidence is undisputed, however, that the contract between the parties was one of partial exchange of properties, and that the contract between them was represented by two contemporaneous instruments. The plaintiff was to select from the shelves of his own store goods, to be computed at the original invoice prices, up to the amount of \$11,710, and to deliver the same in partial exchange for the farm, and to pay in money the difference of \$10,000, and thus was the contract executed. Defendant offered evidence tending to prove the alleged actual value of the goods so delivered, and tending to prove that they were worth not to exceed from 5 to 15 percent of the invoice prices, at which they were figured for the purpose of trading. Some evidence of this kind was at first rejected by the trial court, but other similar evidence was afterward received for a limit-

ed purpose. This limited purpose was set forth to the jury in Instruction No. 5, which is as follows:

Par. 5. Testimony has been admitted upon the trial to the effect that the value agreed upon between the parties as the price or value at which the plaintiff's goods were to be taken in the exchange was far in excess of the reasonable market value thereof, and you are instructed that such fact, if proven, is proper to be considered by you, with all the other evidence, in determining whether the plaintiff was induced to make the trade in question by the false and fraudulent representations, if, any, of said Casselman, and for this purpose only. The mere fact, if proven, that said goods were only worth a small fraction of the value placed upon them by the parties in the trade will not be sufficient to defeat a recovery, or even operate to reduce the amount thereof, unless you find that that fact, and not the false and fraudulent representations complained of, if any such were made by said Casselman, was the main and material inducement which caused the plaintiff to make the trade. In other words the plaintiff had a right to trade his goods to the best possible advantage. He is not charged with any fraud in the transaction, and therefore, if he made an advantageous bargain, he is entitled to the full benefit thereof; and the mere fact, if it be a fact, that in case he recovers in this action he will be receiving much more for his goods than they were fairly and reasonably worth, will not be sufficient to defeat such a recovery, or lessen the amount thereof, if the facts necessary to entitle him to so recover have been proven and established, as stated and explained in this charge. But if, from all the evidence before you, including this fact, if proven, you believe that the false and fraudulent representations, if any, made by the said Casselman were not the material inducements relied upon by the plaintiff in making the deal in question, as explained in this charge, then he can not recover anything in this action, and your verdict will be for the defendant.

The defendant complains of this instruction. It was settled by this court in an early day that, in an action for false representations in the sale of land, where part

of the consideration was an exchange of property, the defendant was entitled to show the actual value of the property received by him, and that such evidence was admissible, not only for the purpose of showing that plaintiff did not rely upon the alleged representations, but also as a circumstance to be considered by the jury in determining whether the fraudulent representations were made. *Likes v. Baer*, 10 Iowa, 89. In *High v. Kistner*, 44 Iowa, 79, this rule was reaffirmed. It is said in the opinion: "The testimony was competent, not for the purpose of fixing the measure of damages, but to throw light upon the conduct of the parties and test the truth of the testimony." In the case first cited the substance of the argument of Justice Wright's opinion is that, if the value of the property received by the defendant was not substantially greater than the value of the property sold by him, it tended to show an absence of motive, which "would render it improbable that defendant made the representations charged or claimed as to the quality of the land, for it is not likely that he would thus overestimate its advantages in order to get a tract worth no more than his own." Taking the case at bar, the plaintiff averred in his petition, and testified as a witness, that he paid \$65 an acre for this land, whereas in its actual condition it was worth not to exceed \$32 per acre. If this testimony should be taken as true by the jury, then so great a variance between the price paid and the actual value of the property was an important circumstance, tending to corroborate the plaintiff's claim that he was in some manner deceived. If the defendant could prove that the difference between the value of the property received by the plaintiff and that which he parted with was much less than claimed by him, it tended to reduce the force of the circumstance above referred to. And if he could prove that there was no difference in value then the force of such circumstance



would be quite destroyed. See, also, *Johnson v. Harder*, 45 Iowa, 677, for a case bearing some analogy.

In this fifth instruction the court charged the jury that the plaintiff was entitled to the benefit of his contract, and that therefore the evidence referred to should be considered only for the limited purpose therein stated. This was an assumption that the evidence in question, unless limited in its purpose as therein stated, tended to deprive the plaintiff of the benefit of the invoice prices bargained for by him for his merchandise. But it must be noted that we are dealing here with a rule of evidence, and not with a rule of measure of damages. There is nothing in this rule of evidence which deprives the plaintiff of any benefit of his contract. The benefit of his contract is secured to the plaintiff by the rule of measure of damage. The rule of measure of damage applicable in such a case fully protects the plaintiff in this respect. It has been framed by the courts with that very end in view. Plaintiff may prove, if he can, that the property purchased by him, if as represented, would have been worth even more than the agreed purchase price, and he may prove such enlarged value by the testimony of witnesses, regardless of the price paid. The rule that defendant should be permitted to rebut the evidence of plaintiff as to the true consideration paid in no sense militates against plaintiff's right to show the real value of the property as it would have been if as represented, and to claim the benefit of his contract in this manner. The idea that the plaintiff may have the benefit of this rule of measure of damage, and in addition to that may have some further supposed benefit from the sale of his goods at invoice prices, is not tenable. This idea is a first impression which often obtains in the mind of bench and bar. But its fallacy can readily be made to appear by putting side by side the two following hypothetical statements: (1) Suppose the land be as good as represented. Plaintiff is

then whole. If whole, he has the full benefit of his contract, including the invoice prices bargained for. And this is so even though the value of the land be less or more than \$65 per acre. (2) Suppose the land be not as good as represented, and that it be worth \$7,000 less than it would have been if as represented. The plaintiff then lacks \$7,000 of being whole. The rule of measure of damage requires the defendant to pay him that sum. That being done, the plaintiff is whole again, as whole as in the first position stated. If whole, we repeat, he has the full benefit of his contract, including the invoice prices bargained for. And this is so even though the value of the land, plus \$7,000, be less or more than \$65 per acre.

Plaintiff is party to only one contract, although it be represented by two contemporaneous instruments; is entitled to one damage, indivisible; and to only one rule for the measure of it. So that the rule of measure of damage is quite adequate to protect the plaintiff in the full benefit of his contract, and the rule of evidence under consideration is in no sense inconsistent with it, nor with plaintiff's full rights in that respect. It follows, therefore, that in this action for damages for false representations in the sale of property, where the consideration was in part an exchange of other property, and where the direct evidence is in conflict as to whether false representations were made, and where the plaintiff has pleaded and put in evidence the alleged consideration paid by him, the defendant is entitled to rebut such evidence by showing the actual value of the property consideration exchanged by plaintiff, and such evidence of consideration, on behalf of defendant, should have been permitted to run with the evidence of consideration on the part of the plaintiff, to be considered by the jury in connection therewith and for the same purposes. And it may be added generally that either party is entitled to show the value of the property

consideration paid or received by him as a circumstance bearing upon the probability, not only whether false representations were relied upon, but also whether the false representations were made. Under this rule the fifth instruction placed too narrow a limitation upon the purpose for which such evidence might be considered.

III. Referring again to the case of *Likes v. Baer*, cited above, it may perhaps be proper to say that, as it was first decided and reported in 8 Iowa, 368, the opinion of the court was adverse to this rule of evidence. A rehearing being granted, the court reconsidered its former opinion on that question, and laid down the rule which we are now following. The second opinion is reported in 10 Iowa, 89. The rule laid down in the second opinion has been followed in other jurisdictions. See *Aldrich v. Scribner*, 146 Mich. 609 (109 N. W. 1122). The case has not often been cited in our own subsequent reports on that question, nor has the case of *High v. Kistner*. Neither of these cases found a place in the careful briefs of counsel in this case, and the question has been submitted to us without any other Iowa citation directly in point. We have therefore discussed the question more elaborately than we might otherwise have deemed useful. A reference should be made here to the case of *Hibbets v. Threlkeld*, 137 Iowa, 164. This question was there considered from the reverse side; that is to say, the plaintiff was the appellant, and complained of an instruction similar in its effect to the fifth instruction in the case at bar. Plaintiff took the ground in that case that the evidence in question was not admissible for any purpose. The point was overruled by this court, and the instruction sustained. But the right of the defendant to complain of the instruction as too narrow was neither involved nor considered in that case. Because of the error in the fifth instruction this case must be reversed and remanded for a new trial.

Other alleged errors are argued, but the questions involved are of such a nature that they are not likely to arise on another trial.—*Reversed and remanded.*

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B. F. LOOSE, Appellant, v. JOHN COOPER, Appellee.

**Dismissal of action.** Where the court dismisses a case on its own  
1 motion it should make a record of the ground of its action, but although failing to do so a presumption obtains in favor of the ruling, and a reversal will not be ordered unless upon the whole case there is no ground to support it.

**Same: WANT OF PROSECUTION: REINSTATEMENT.** The court has power  
2 to dismiss a cause for want of prosecution independent of any statute; and where a case remained on the docket for five years after issue was joined and plaintiff and his attorney were in the court room but made no objection to the order of dismissal the court was justified in refusing a motion for reinstatement.

*Appeal from Polk District Court.*—HON. W. H.  
McHENRY, Judge.

SATURDAY, NOVEMBER 21, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

*Affirmed.*

H. H. Crow, for appellant.

No appearance for appellee.

EVANS, J.—On November 23, 1901, plaintiff and defendant entered into a written contract whereby the defend-  
•

ant agreed to sell to the plaintiff certain stock in the Fidelity Insurance Company for an agreed price of \$11,250, to be paid, with 5 percent interest, at the rate of \$125 per month. Other provisions were contained in the contract which need not be noticed here. The contract provided for liquidated damages in the sum of \$21,750. The plaintiff has brought this action for such liquidated damages. The defendant has filed a counterclaim for \$20,550 as damages for breach of contract. The plaintiff filed his petition on April 22, 1902. The defendant filed his answer and counterclaim on May 12, 1902. The plaintiff filed his reply denying the counterclaim on May 16, 1902. No further proceedings of any kind were ever had in the case until June 29, 1907, and on that date the district court on its own motion dismissed the case at plaintiff's cost. Afterwards, on September 9, 1907, the plaintiff filed a motion to reinstate the case, and on September 18, 1907, this motion was by the court overruled. The plaintiff appeals.

Plaintiff's contention is that the court was not warranted in dismissing this case on its own motion, there being no request for a dismissal from either party. The ground upon which the court entered the dismissal does not appear in the record.

1. DISMISSAL  
OF ACTIONS.

We would be better satisfied with this record if such ground did appear. When a court acts in such a case upon its own motion, it is highly desirable that it should state the ground upon which it acts. The failure to do so gives an appearance of arbitrary action, and is a practice not to be commended. Nevertheless, we are required to indulge in a presumption in favor of the ruling of the trial court. We are not justified in reversing it unless from an examination of the whole record we fail to find any ground to support it.

It is quite apparent upon the face of this record that the court would have been justified in dismissing this case

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for want of prosecution. The power is inherent in the court, quite independent of the statute. The issues were made up and the last pleading filed on May 16, 1902. For more than five years thereafter the case lay in a comatose condition. The amounts involved in both petition and counterclaim were sufficiently large to warrant some show of activity on the part of both parties. Apparently no effort was made by either party to bring the case to trial. Plaintiff states in his argument in this court that he and his attorney were present at the time of the dismissal. But it does not appear from such statement nor from the record that he made any objection at that time to the action of the court, nor took any exception thereto. Afterwards he filed a motion to reinstate, but it does not appear that he served any notice of such motion upon the defendant.

Appellant cites the case of *Hensley v. Davidson Bros.*, 135 Iowa, 106. That case and the one at bar are not at all parallel. The power of the court to set aside a verdict on its own motion was conceded in that case. It was held, however, that the only possible ground of the court's action in that case was the insufficiency of the evidence. Inasmuch as this court had in a former appeal held that the evidence was sufficient to sustain a verdict for the plaintiff, it was held that the lower court was not justified in ignoring the decision of this court, and its action was therefore reversed. No such question is involved in the case at bar. The court below was acting within the limits of a broad discretion which it was required to exercise fairly. We can not say that, under the circumstances appearing in this case, the court abused that discretion.

The contract sued on in this case seems to have been drawn with such skill as to afford to each party a substantial cause of action against the other. The parties were prompt in going into court and in making up the issues. If in fact the defendant had notice of plaintiff's

motion to reinstate, he made no resistance to it. He appears to have been served with notice of appeal to this court, but he makes no appearance. The circumstances surrounding the case are such as to fairly warrant a belief that the issues presented by the pleadings were fictitious and perhaps collusive, and that the records of the court were being used for ulterior purposes.—*Affirmed.*

141	380
144	174

IN RE JOHNSON DRAINAGE DISTRICT, No. 9, CHICAGO AND NORTHWESTERN RAILWAY COMPANY and TOLEDO & NORTHWESTERN RAILROAD COMPANY, Appellants, v. HAMILTON COUNTY, IOWA, BOARD OF SUPERVISORS OF HAMILTON COUNTY, IOWA, ET AL.

**Drainage:** ASSESSMENT OF BENEFITS: RAILWAY LANDS: NOTICE: APPEAL: STATUTES: CONSTITUTIONALITY. The Act of the 30th General Assembly relating to the assessment of benefits for drainage purposes provides a separate and distinct method for the assessment of railroad lands from that provided for agricultural lands, and does not contemplate that railroad lands shall be classified in tracts of forty acres or less; and express provision is therein made for notice to railway companies of the assessment and for the right of appeal, so that the act is not unconstitutional for failure to so provide in either respect.

**Drainage:** ASSESSMENT OF RAILWAY LANDS: BENEFITS: PRESUMPTION.  
2 An assessment for drainage purposes can only be made for actual benefits, but a presumption obtains in favor of an assessment and the burden is on the party attacking it as excessive and disproportionate to establish the claim; and where the evidence fairly tends to show that the assessment of railroad lands is not in substantial excess or out of proportion to that of other lands in that district, it will not be disturbed.

*Appeal from Hamilton District Court.*—HON. J. R. WHITAKER, Judge.

MONDAY, NOVEMBER 23, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE appellants appealed from an assessment of benefits to the district court where their appeal was dismissed, and, from that judgment, they appeal to this court.—*Affirmed.*

*J. L. Kamrar, George E. Hise, James C. Davis, and A. A. McLaughlin, for appellants.*

*D. C. Chase and J. M. Blake, for appellees.*

SHERWIN, J.—The commissioners appointed to classify the lands and property in the drainage district, and assess the benefits thereto, did not classify the railroad right of way as farm lands were classified, nor did they make any classification thereof in fragments or subdivisions. The railroad property in the district consisted of about sixty-seven and a half acres in twenty-one different forties. The benefits were assessed in a lump sum on the entire holding, and the appellants contend that such an assessment is wholly unauthorized by chapter 68, Acts 30th General Assembly that the assessment of \$800 was greatly in excess of the benefits, and greatly in excess of, and out of proportion to, the assessments on farm lands; and that said assessment was not equalized with the assessments on other lands in the district.

1. DRAINAGE:  
assessment of  
benefits: rail-  
way lands:  
notice: appeal:  
statutes: con-  
stitutionality.

The appellants rely upon the following propositions:

(1) The commissioners to assess benefits were required to classify the railroad lands, and give each portion thereof a percentage of benefits, based upon the percentage of one hundred, as a condition to making an assessment, and as a basis therefor.

(2) If the railroad property is not land, the drainage law is void, because only in such event is notice re-



quired to be given to a railway company, and only in such event is the right of appeal given to it.

(3) It was the duty of the commissioners to assess benefits to equalize the assessment against the railroad property with the assessments on other lands.

(4) Having failed to classify the railroad lands and equalize the assessment thereon with the assessments on other lands, and having failed to comply with the statutes in the time and manner of performing their duties, on the part of the commissioners, the assessment is void.

(5) The report of the commissioners failing to show that the railroad lands had been classified, and the assessment equalized, the board of supervisors did not acquire jurisdiction to make an assessment.

(6) Appellants' property can be assessed only for the actual benefits accruing to it from the improvement, because of the drainage, and in the proportion that other property is assessed.

(7) The commissioners having failed to comply with the law in making the pretended assessment, and no classification or equalization having been made, there is no presumption that the amount assessed is a correct estimate of benefits to the railroad property from the improvement, nor is the amount *prima facie* in proportion to the assessments on other lands.

(8) If the assessment is not void, then it is grossly excessive and should be reduced.

We shall consider these propositions in the order of their presentation to us.

Section 12, chapter 68, Acts 30th General Assembly, provides for the appointment of commissioners to assess benefits conferred by the improvement. It defines their duties in the following language:

They shall . . . personally inspect and classify all the lands benefited by the location and construction of such . . . drainage district . . . in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed im-

provement; . . . and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof.

The appellants urge that the railroad property within the drainage district is either land within the meaning of the statute, or else the statute, so far as railroads are concerned, is unconstitutional, "in that no provision is made for giving notice to any except landowners, incumbancers, and occupiers of land, and no appeal is provided for any except owners of land." That railroad property within the district is not land within the meaning of the statute, and is not to be classified as lands are, is made clear by the statute itself. For the purpose of ascertaining and assessing the benefits conferred by the improvement, the statute makes three classes or divisions of property. Section 12 provides for one class which includes lands used for the usual and ordinary purposes. Section 19, after making provision for the construction of the drainage ditch across the right of way of a railroad company, provides as follows:

All other proceedings in relation to railroads shall be the same as provided for individual property owners within the district, except that the cost of constructing the improvement across its right of way shall be considered as an element of its damages by the appraisers thereof; and the commissioners to assess benefits shall fix and determine the actual benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return. Such special assessment shall be a debt due personally from the railroad com-

pany, and, unless the same is paid by the railroad company as a special assessment, it may be collected in the name of the county in any court having jurisdiction.

Section 20 also makes a separate class of highways, and provides that:

Whenever any highway within the levee or drainage district will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of the benefit to such highway.

A further provision is therein made for notice to the township in which the highway is located and for a hearing and determination of the amount to be apportioned to the road district on account of such benefit. It seems to us that there can be no serious question as to this legislative classification. Neither railroad property nor highways are used as lands are ordinarily used, and hence the benefits to be derived by such property from the improvement are of an entirely different character from those conferred upon agricultural lands. This was manifestly the thought of the Legislature, for in the sections relating to railroads and highways the commissioners are given express directions as to what shall be done by them. In section 19 they are directed to "fix and determine the actual benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return." If the railroad property was to be classified and assessed as land under the provisions of section 12, the provision of section 19 was entirely unnecessary and useless. Why require an independent assessment and an additional report if it was all covered by the provisions of section 12? No logical or satisfactory answer can in our judgment be made to the question. Moreover, special provision is made for the col-

lection of the assessment, and the assessment is made the personal debt of the railroad company. They are provisions which do not apply to assessments made under section 12, and which in our judgment strengthen the conclusion that the Legislature intended to make railroad assessments a class entirely distinct and separate from that of the ordinary landowner. And, if this be true, we think it follows that there was no intention that railroad property should be classified in tracts of 40 acres or less according to "the legal or recognized sub-divisions in a graduate scale of benefits, to be numbered according to the benefit to be received by the improvement."

The contention that if the railroad property is not land within the meaning of section 12 and to be assessed as such, the law is unconstitutional and void because only in such event is notice required to be given to a railroad company, is clearly without merit. Section 19, as we have heretofore shown, expressly provides that "all other proceedings in relation to railroads shall be the same as provided for individual property owners within the district." And such requirement clearly and unmistakably provides for the notice called for by sections 3 and 12. An appeal is given the railroad company by section 14 of the act.

As we understand the appellants' argument, their third, fourth and fifth propositions are, in effect, based on their contention that the railroad property should have been assessed and equalized as lands under the provisions of section 12, and what we have already said on that subject may be applied to these propositions without further discussion thereof.

In support of their sixth and eighth propositions, the appellants urged that their property can be assessed only for the actual benefits accruing thereto from the improvement, because of the drainage, and in the proportion that other property is assessed, and that the assessment is

2. DRAINAGE:  
assessment of  
railway lands:  
benefits:  
presumption.

grossly excessive. These two contentions may be disposed of together, for they involve questions of fact only; it being well settled that an assessment can be made for actual benefits only. *Zinser v. Board of Supervisors*, 137 Iowa, 660.

On the questions of fact there was a diversity of opinion. If some of the appellants' witnesses were correct in their opinions, the improvement might be said to be a damage to the appellants' road rather than a benefit. But such estimates are not decisive of the question, and we think the evidence as a whole fairly sustains the trial court's finding that the assessment was not in substantial excess of the benefits to be derived therefrom in the way of the betterment of the roadbed and track and not out of proportion to the assessments on the lands within the district. The presumption is in favor of the assessment established by the board, and the burden is on the appellants to overcome the same. *Temple v. Hamilton County*, 134 Iowa, 706. On the whole case we conclude that the judgment should be *affirmed*.

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J. H. MERRILL, J. W. GARNER AND CALVIN MANNING,  
Appellees, v. J. B. SAX, Appellant.

**Principal and agent:** SECRET PROFIT: ACCOUNTING. An agent or  
1 confidential representative can not secretly profit by the transaction but is required to account to his principal for all such profits, even though received in a transaction relative to the subject matter in excess of his authority, and this duty is not relieved by accounting for the full price at which he was authorized to make the sale of the property; so that where defendant, an owner with others of certain corporate stock, was appointed by them to complete a transfer of all the stock, including his own at a price agreed upon, each to pay his proportionate share of the expense, demanded and received of the purchaser as a condition precedent to delivery a large sum in addition to the agreed purchase price, he could not secretly

141	386
141	348
141	487

retain the same as a commission but must account to his associates therefor.

**Same: GRATUITOUS AGENCY.** The fact that an agent acts gratuitously  
2 does not relieve him from the obligation to account to his principal for all profits made out of the subject matter of his agency; but where one of several owners of corporate stock is appointed by them to close a sale of the whole, less than which the purchaser would not buy, at the expense of all in proportion to their interests, the agency is not gratuitous.

**Same: COMPENSATION OF AGENT.** The express agreement by which  
3 one of several owners of corporate stock is to have his expenses in closing a sale of their combined holdings, excludes the idea that he is to be compensated for his services; but even if he was entitled to compensation in addition to his expenses, that fact would not relieve him from the obligation to account to them for any sum received from the purchaser in addition to the agreed purchase price.

**Same: FRAUD.** Although an agent for the sale of corporate stock  
4 demanded from the purchaser a sum in addition to the agreed purchase price, as a condition precedent to its delivery, and the purchaser knowing his rights yielded to the demand, it did not constitute a legal fraud.

**Principal and agent: ACCOUNTING.** Where one of several owners  
5 of corporate stock was authorized to complete a sale of all their interests and they united in paying his expenses incident thereto, a sum demanded and received by him from the buyer in excess of the agreed purchase price of the stock was in effect the price of its delivery, and should be accounted for to the several owners.

*Appeal from Wapello District Court.*—HON. C. W. VERMILLION, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE opinion states the case.—*Affirmed.*

*Smith & Lewis and Jaques & Jaques*, for appellant.

*Tisdale & Heindel and Work & Work*, for appellees.

WEAVER, J.—The plaintiffs' case, as stated in their petition, is to the following effect: On December 19, 1905, the Ottumwa Traction & Light Company was a corporation owning certain public service franchises in said city. Certain persons residing in said city, and spoken of in the record as the "Ottumwa crowd," or "Ottumwa parties," including plaintiffs and defendant, owned in varying proportions a majority of the shares of preferred and common stock which had been issued by said corporation and were then outstanding. The remainder of the stock issued was owned by parties residing in St. Louis, Omaha and places other than Ottumwa. These parties residing in Ottumwa were in the habit of consulting together and acting in harmony with reference to the protection and promotion of their several interests in said corporation, of which the plaintiff Merrill was president, and the defendant Sax secretary. All these parties desired to dispose of their stock if a buyer at a suitable price could be found. Late in October, 1905, a representative of H. M. Byllesby & Co., of Chicago, appeared at Ottumwa and made some inquiry or investigation into the affairs of the corporation with a view to the purchase of the stock. While there, he made some suggestion in a tentative way as to the price which his principal would be willing to pay for said stock provided the entire issue could be obtained, and the Ottumwa parties, or those holding the bulk of the stock, including plaintiffs and defendant, met in consultation upon the subject. At that interview it seemed best that negotiations on behalf of said parties be conducted by some representative or representatives acting in the interest of all, rather than by each acting separately, and it was agreed to place the matter in the hands of the defendant, who was to be assisted by Maj. Mahon, one of their number, if assistance was required. Thereupon the de-

fendant and Mahon began negotiation, upon the one hand, to obtain a definite proposition from the proposed purchaser, and, upon the other, to secure the consent or co-operation of the other stockholders residing outside of Ottumwa. On November 7, 1905, Sax entered into a written contract with Byllesby & Co., by which said corporation agreed to pay to Sax the sum of \$384,000 for the entire issue of preferred and common stock in the traction and light company; the price being reckoned at the rate of ninety cents on the dollar for the preferred stock and sixty cents on the dollar for the common stock. By the closing paragraph in said contract Mr. Sax states that he will use his best endeavors to make the delivery according to the contract, and that the same should include his own holdings for over \$95,000 par value of the preferred stock and over \$125,000 par value of the common stock. These last sums mentioned constitute substantially the sum of preferred stock and common stock then held by said Sax, Mahon, and the plaintiffs herein. Sax and Mahon visited and interviewed the stockholders residing in St. Louis and Omaha, and while these stockholders declined to consummate any deal with them or through them, they opened up negotiations with Byllesby & Co. direct and perfected a sale of their shares. To enable Sax to carry out his agreement, the plaintiffs and Mahon entered into a writing, whereby they agreed to deliver to him their respective holdings of the stock at the prices above named. Said writing embodied also the following stipulation: "We agree to deliver these shares of stock to you or any one you may designate upon the terms of the above-mentioned amount, less cost for expense incurred in negotiating said sale, which is not to exceed two percent of the sale price." On December 7, 1905, the negotiations had been so far perfected that defendant, having secured the assignment of the stock of the Ottumwa parties and having the certificates in his possession or under his control



ready for delivery to the purchaser, went to Byllesby & Co. and insisted, as a condition of the delivery of the stock so held by him, that he be paid a sum equivalent to three percent of the entire purchase price of all of the stock. This demand was for a time resisted, and, after an unsuccessful attempt to satisfy defendant by the offer of \$3,840, a compromise was reached, by which he was paid the sum of \$7,680, and the stock was delivered and the deal closed. On returning to Ottumwa, defendant reported the sale to the parties in interest, and, after deducting the expenses which he and Maj. Mahon had incurred in carrying the deal to a successful conclusion, accounted to the several parties in interest for their respective proportions of the stock sold at the contract price above named. In making said report he concealed or withheld the fact of the receipt of said sum of \$7,680, and has never accounted therefor, though it appears that he at some time made it known to Mahon, to whom he paid \$2,500. It is the claim of plaintiffs that the defendant in negotiating and completing the sale was not acting for himself only, but as agent of the other Ottumwa stockholders, that his receipt of said sum of \$7,680 and the concealment of said transaction from them was a breach of his duty as their representative, and they demand that he make an accounting for the money so obtained. The defendant denies that in conducting said negotiations or in making the said sale he was acting in any manner as agent of the plaintiffs. He pleads also many facts which are largely in the nature of matters of evidence the substance of which is that he undertook the contract with Byllesby & Co. on his own responsibility and that he is under no obligation to account to plaintiffs for the additional sum obtained by him from said purchasers. On hearing the evidence the trial court found for the plaintiffs and entered a decree requiring the defendant to account for the money so received to each of said plaintiffs

in the proportion which their holding of stock bore to the entire amount held by said Ottumwa parties. The defendant appeals.

The record of the testimony is entirely too voluminous to permit its rehearsal in this opinion, even in condensed form. We have read it with the care which its importance

1. PRINCIPAL  
AND AGENT:  
secret profits:  
accounting.

demands, and find that it fully sustains the conclusion of the trial court upon all disputed questions of fact. In addition to the positive and direct testimony on part of the

plaintiffs, it is impossible to reconcile the admitted conduct of appellant upon any other theory than that he undertook to and did act in a representative capacity for the plaintiffs and his other fellow stockholders at Ottumwa. Such being the conclusion, we have to inquire whether, conceding the existence of that relation, he is liable to account to those whom he represented for the money exacted by him from Byllesby & Co. in excess of the contract price of the stock. Counsel for appellant direct our attention to a line of authorities in support of the proposition that a person may act as agent for both seller and buyer where both parties are aware of his conduct in that respect and consent thereto, and that the agent of the seller may rightfully treat or deal with the buyer with respect to the subject-matter of the agency so long as such conduct or dealing does not conflict with the agent's duty to his principal. The soundness of the doctrine thus stated need not be questioned, but its application to the case at bar can not be conceded. All of the parties, appellees and appellant, were acting jointly in an endeavor to get the best possible price for their stock, and the execution of that purpose was confided to appellant. It was clearly his duty to give to his associates the benefit of his best service in the discharge of the trust confided to him, and to account for the entire amount paid to him by the purchaser. To say that the money in question was not paid to him in consideration of

the sale of this stock, but was in the nature of a commission or payment for services otherwise rendered to Byllesby & Co., is to ignore practically all of the material facts in the case.

In the first place, appellant performed no service as agent for Byllesby & Co. He did not represent that concern in any respect. He did undertake to sell to them an amount of stock substantially equivalent to the entire holdings of the Ottumwa parties for whom he was acting, and to use his best endeavors to procure the sale to them of all the remainder of the stock at a given price. In other words, as between him and Byllesby & Co., it was an ordinary contract of purchase and sale into which not the slightest element or appearance of agency entered. On December 7, 1905, the deal had developed to a point where appellant felt himself in position to demand terms from Byllesby & Co. He had in his possession the stock which had been held by himself, Mahon, and the plaintiffs, and without which the scheme of the purchaser to take in the entire issue and reorganize the corporation could not be effected. Availing himself of this advantage, he impressed upon Byllesby & Co. the belief that the sale would not be carried out unless they paid him a large sum in addition to the contract price, and, yielding to his demand, the money in controversy was paid over to him. To call this exaction a commission is to dress the transaction in a garb it is not entitled to wear. The money so received by him was received for doing the very thing which he had agreed to do and which in good faith to those who intrusted him with their stock he was bound to do, and it would be a most dangerous as well as inequitable rule to permit him to retain the sum so realized and avoid accounting therefor. If A. places his horse in the hands of B., with authority to negotiate a sale to C. on the best obtainable terms, and B., having obtained an offer which he is directed to accept, goes to C., and, while having the horse

ready for delivery, refuses to make it until C. makes him a large additional payment, which he does not report or account for, we think his defense to an action for an accounting will receive little favor in a court of justice, even though he calls the sum thus received a "commission." Let us then bring the illustration a little closer home, and suppose that four different persons each own a horse which he desires to sell, and C. is willing to buy providing he can purchase all of them. To facilitate the deal, the four persons agree that one of their number, A., shall conduct the negotiations; each to pay his proportionate share of the expense which may be thus incurred. Armed with this authority, A. agrees with C. to sell him the four horses for \$100 each, and this, being reported to the several owners, is agreed to, and the horses placed in A.'s hands for the consummation of the deal. Thereupon he goes to C. and refuses to make delivery of the property until he has received an additional percentage upon the agreed price, which he chooses to call a "commission." If this demand be submitted to, and he places the money so obtained in his own pocket, concealing the transaction from those associated in interest with him, does A. occupy any more favorable position than he did in the first illustration above used? We think not. If there be any difference, his relation to his associates in the latter deal is of a closer and more confidential nature than was his relation to his principal in the former. They were engaged in a common enterprise, working together to a common end, the disposition of the property of each and all at the best obtainable price, and each was entitled to open-handed frankness and fairness of dealing at the hands of the others, and especially at the hands of the man selected to represent them in the actual negotiations and consummation of the sale. *Getty v. Devlin*, 54 N. Y. 403. To permit an agent or confidential representative to secretly profit by his manipulation of the subject-matter of his agency is to offer a premium

to fraud and breach of faith. The law therefore holds him bound to account to his principal for all such profits, even though they were received by transactions in excess of the authority given him, and this law is none the less imperative because he accounts for the full price for which he was authorized to sell. Story's Agency (8th Ed.) sections 207-214; 1 Clark & Skyles, Agency, sections 406, 417; *Salsbury v. Ware*, 183 Ill. 505 (56 N. E. 149); *Holmes v. Cathcart*, 88 Minn. 213 (92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513).

Appellant makes the further point that at most he was acting as a gratuitous agent, and is therefore not to be held to the same strict liability for an accounting; but

2. **SAME:**  
**gratuitous**  
**agency.** he was not in any sense of the term acting gratuitously. These persons, as we have seen, were engaged in a common enterprise to dispose of their holdings of stock. As the purchaser wished all or none, the appellant and appellees each had a direct interest in bringing about the sale of the stock of his associates, and their agreement to share with appellant the expense incurred was also a valuable consideration, if any was needed, sufficient to support his express or implied agreement to represent their interests. Moreover, the agent who acts gratuitously is not in any manner relieved from the ordinary obligation upon agents to act in good faith with their principals and to account to them for all profits made out of the subject-matter of their agency. *Salsbury v. Ware*, 183 Ill. 505 (56 N. E. 149).

Finally, it is said in appellant's behalf that the claim or appellees is inequitable because they do not offer to pay him for "his skill and knowledge devoted to carrying through the enterprise and after reaping the full benefits of a satisfactory sale come into court and coldly demand a portion of that which he receives from another as his personal earnings." Counsel overlook the very obvious and very pertinent truth

3. **SAME:**  
**compensation**  
**of agent.**

that it was appellant's skill and knowledge and personal service which the law bound him to render to those for whom he undertook to act. The express stipulation by which he was to be reimbursed for expenses incurred excludes the idea of an implied agreement to pay him any more, and, even if he were entitled to payment of a reasonable compensation by appellees in addition to his expenses, that fact would be no justification for his act in secretly obtaining a personal profit out of the matter which he was conducting, or professing to conduct, for their mutual advantage and interest.

Nor can his action in this respect be regarded as a fraud or wrong upon Byllesby & Co. for which he is accountable alone to that corporation. Byllesby & Co. knew

4. SAME: fraud. that under their contract with appellant they were entitled to the stock held or controlled by him on the terms there specified, and if the purchase was a matter of such importance to them that they preferred to hasten it by yielding to his demand, however unjust, and waive their right to insist upon performance of the agreement according to its terms, there was no fraud perpetrated upon them in the legal acceptance of that word, however such conduct may be rated when tested by the highest standard of business morals.

The alternative proposition advanced by the appellant that, if liable at all, his inability is limited to the so-called "commission" received on the sale of the shares

5. PRINCIPAL AND AGENT: accounting. held by the plaintiffs is untenable. In the first place, the service performed by him in interviewing and soliciting the stockholders in St. Louis and Omaha, and for which it is argued he could properly receive payment, was done in his representative capacity as agent and associate of the Ottumwa stockholders, who united in paying his expenses so incurred, and for any compensation or profit obtained by him therein he is bound to account. In the next place, it is

perfectly clear that appellant had no lawful claim or demand against Byllesby & Co. (except upon the contract of sale); but being in possession of the stock owned by himself and associates which it was his duty to deliver to said purchasers, he made such delivery the lever or instrument by which the additional money was extracted from them. Byllesby & Co. had already secured the remainder of the stock, and they paid this demand by appellant to secure the delivery of the shares controlled by him. The money so received, by whatever name it may be called, was in substance and effect the price of the delivery of the Ottumwa stock, and it is equitable and just that defendant account to the several owners on that basis.

Other objections urged to the decree are either not borne out by the record, or they necessarily fall with those we have already considered and overruled.

The decree of the district court is right, and it is *affirmed*.

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W. F. GIGRAY, Appellee, v. W. D. MUMPER, Appellant.

**Conditional sale: FORFEITURE: WAIVER: EQUITABLE JURISDICTION.** Although a contract for the sale of personal property reserving title in the seller until the purchase price was fully paid, authorized a forfeiture in case of default in payment, such right of forfeiture was not the exclusive remedy, but could be waived, and a suit in equity brought to enforce the claim as a lien against the property: as where there was a dispute as to the balance due and the seller waived his right to forfeit the contract, asked to have amount due ascertained and that he retain his lien on the property therefor, his cause was triable in equity and a motion to transfer to the law docket was properly overruled.

*Appeal from Clarke District Court.*—HON. H. K. EVANS,  
Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THIS is a suit in equity to recover the balance of purchase price of an undivided one-half of certain personal property, and to foreclose a conditional contract of sale thereof. The prayer of the petition is that plaintiff have judgment and decree for the balance due, and that the same be decreed a lien on the property described in the contract, and that a special execution issue thereon. Defendant moved to transfer the cause to the law side of the docket. The motion was overruled, and the defendant declined to plead further. Decree was entered for plaintiff for \$60 and making the same a lien upon the property, and ordering special execution. Defendant appeals.—*Affirmed.*

*O. M. Slaymaker*, for appellant.

No appearance for appellee.

EVANS, J:—The plaintiff sold to the defendant his undivided one-half interest in a certain stock of plumbing tools and materials for the consideration of \$200. Of this consideration \$25 was to be paid in cash and \$10 per month thereafter. The contract of sale reserved to the seller the title to the property until the consideration should be fully paid. The plaintiff claimed that the defendant had made payments to the amount of \$85, and no more, and that there was a balance due of \$115. The plaintiff averred, however, that the defendant claimed to have paid more and that a less sum was due than claimed by plaintiff, and plaintiff prayed for an adjudication of the question in dispute.

The argument of the appellant is that the plaintiff was entitled to maintain an action at law for the alleged balance of the purchase price, and that, whenever he elected



to bring such action, he waived his title to the property, and that he could enforce no lien thereon. The position is not well taken. It should be noted that the contract imposed a personal liability upon the defendant to pay the full purchase price. Although the contract therefor on its face reserved the title to the property to the seller until it was fully paid for, and gave to the seller a right to declare a forfeiture upon default of payment, such remedy was not exclusive. It is also true that a court of equity has power under some circumstances to declare such a contract a mere security, and to protect the purchaser from unconscionable forfeiture. In this case a large part of the purchase price had been confessedly paid. A dispute existed as to how much balance remained unpaid. The plaintiff waived his right to declare a forfeiture, but asked that he retain his security for the payment of such balance as should be found to be due. We think his petition stated a cause of action that entitled him to a hearing on the equity side of the court, and the motion to transfer was properly overruled. Whether the refusal of the court to transfer the case to the law side of the docket did preclude the defendant from denying the equity of the bill by his answer, or from claiming therein his right of trial to a jury we need not determine. The defendant did not plead. He stood upon his motion to transfer. For the purpose of that motion the allegations of the petition and the prayer for relief were conclusive upon the court. There was no error in the ruling and the decree is *affirmed*.

**E. J. BREEN, Appellant, v. L. A. MAYNE and J. J. MAYNE,  
Appellees.**

**Options: MANNER OF EXERCISE: HOW DETERMINED.** The manner of  
1 exercising an option is to be gathered from the language of  
the instrument creating it, aided by competent parol evidence  
of the intent of the parties.

**Same: ACCEPTANCE.** An offer without an acceptance does not con-  
2 stitute a contract, and generally the acceptance must accord  
with the terms of the offer.

**Option contract for sale of land: EXERCISE OF OPTION.** Under a  
3 contract agreeing, at the purchaser's option, to sell certain  
lands at any time before a fixed date at an agreed price pay-  
able on delivery of a deed, and with a further provision that  
if the buyer sold the land within the time the owner would  
make a deed to the purchaser and furnish an abstract showing  
perfect title, and would also accept the purchaser's note and  
mortgage for a deferred payment, it is held that payment of  
the purchase price was not essential to completion of the con-  
tract, and that the holder of the option could make his elec-  
tion to purchase in any lawful manner within the time limit,  
and within a reasonable time thereafter tender the purchase  
price.

**Same: STATUTE OF FRAUDS.** An option contract for the sale of  
4 land signed by the party to be charged is not within the statute  
of frauds, therefore the acceptance of the option need not be  
in writing.

**Same: ACCEPTANCE OF OPTION: EVIDENCE.** The acceptance of an  
5 option to purchase land must be unqualified and unequivocal  
and communicated to the party extending it, and must become  
by the acceptance a mutual binding contract. Evidence held  
insufficient to show acceptance.

*Appeal from Cerro Gordo District Court.*—HON. CLIFFORD  
P. SMITH, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

SUIT in equity for the specific performance of an option contract to convey land. The trial court dismissed the petition on the theory that plaintiff did not exercise his election within the time fixed by the option to purchase. Plaintiff appeals.—*Affirmed*.

*Blythe, Markley, Rule & Smith*, for appellant.

*Clarke & Chambers and Cliggitt, Rule & Keeler*, for appellees.

DEEMER, J.—Defendants were the owners of an undivided one-half of the property in controversy, and in October of the year 1906 plaintiff, through his agent Knapp, attempted to procure from J. J. Mayne an option upon this property. Knapp was referred to one McNider as being an agent to sell the land, and he so informed his principal. Plaintiff then went to McNider, and after some negotiations the following option was obtained by him:

For and in consideration of one hundred seventeen dollars in hand paid, and other good and valuable considerations rendered by E. J. Breen of Fort Dodge, Iowa, the receipt of which is hereby acknowledged, I, L. A. Mayne, of Cerro Gordo County, State of Iowa, agree to sell to said E. J. Breen, at his option, at any time on or before October 17, 1906, the following described premises situated in the county of Cerro Gordo and State of Iowa (here follows a description of the property), containing 117 <sup>20</sup>/<sub>100</sub> acres at the agreed price of one hundred and fifty dollars per acre and upon the terms as follows: Seventeen thousand five hundred and fifty dollars on delivery of deed. All of the deferred payments to draw interest at the rate — percent from the date of deed, payable annually. And said L. A. Mayne expressly agrees that in case that E. J. Breen sells said herein above described land at any

time within the term of his contract, that he will at the request of said E. J. Breen, execute and deliver to the purchaser, that may be named by said E. J. Breen, a good and sufficient warranty deed, with full covenants, conveying and assuring the fee simple of said premises, together with an abstract showing perfect title in giver of deed, and agrees to accept the purchaser's notes for the deferred payments, said notes being in amount, and time of payment as above set forth, and secured by — mortgage on above described premises. In witness of which said parties have hereto caused these presents in duplicate to be executed on this 17th day of April A. D., 1906. J. J. Mayne. L. A. Mayne. Witness, C. H. McNider.

The payment under this contract was made directly to McNider. Plaintiff then lived at Ft. Dodge, and was obtaining options upon this and other land for himself and others, thinking that they might prove profitable to a cement plant which they were then constructing in Mason City, Iowa. Soon after securing the option, plaintiff and his associates set men to work drilling upon the land, and it is contended that the results were satisfactory, that defendants were notified of that fact, and informed that he, Breen, would take the land under the option. There is no conflict in the testimony regarding some of the matters; but upon the determinative issues, or rather upon the inferences to be drawn from the testimony, there are serious disputes both of fact and law. The option was obtained in April of the year 1906, and it expired on October 17th of the same year. On September 20th, plaintiff wrote one of the defendants asking for an abstract to the land, saying that he would like a little time before the option expired to examine it and to get matters fixed up. Mayne did not answer in person, but on October 3d, McNider wrote, sending an abstract and saying, "We are ready to furnish deed." October 4th Breen wrote McNider acknowledging the receipt of the abstract, and saying he would have his attorneys examine it in the near future.

On October 15th Breen returned the abstracts to McNider by mail, calling his attention to the defects pointed out by his attorney, and saying, "I take it that these matters can be fixed up." Breen went to Mason City on the 16th, going to the abstractor's office to see if the defects pointed out in the abstract had been corrected, and learned they had not been. He then went to the bank where McNider had his office, and found that he (McNider) had gone away (to St. Louis as reported), and that he would not be back for a few days. He also learned that his letter to McNider inclosing the abstracts had not been opened. He then, it is claimed, drove to the Mayne home and found no one there. He endeavored to find one of the Maynes in Mason City, but was unable to do so. Returning to his home without seeing either McNider or the defendants, he again came to Mason City on the 19th or 20th day of October and called upon McNider. He (McNider) returned the abstracts to Breen, and Breen then went in search of the Maynes. He finally found them, and Mr. Mayne, so it is claimed, pursuant to his previous request, promised to go to Mason City to try to get the title adjusted and the matter of the sale fixed up. Whatever the truth about this, Mayne did not come to Mason City to see plaintiff, but according to his, plaintiff's, testimony, he, Mayne, avoided him. It appears without dispute that after midnight on October 17th the Maynes gave another option upon the land to some other parties representing a rival cement plant, in which the optionees agreed to hold the Maynes harmless for refusing to carry out the one theretofore given the plaintiff. It seems that after the option was given plaintiff, the Maynes indicated a desire to reserve a part of the lands covered by their option, and that they continued thus to talk down to about October 20th. McNider returned to Mason City on October 19th, and on October 20th he wrote plaintiff acknowledging the

receipt of the abstracts and saying that he would have the corrections made as indicated in Breen's letter.

In a general way the matters so far recited are undisputed, save defendants say that McNider was not at any time their agent in the matter, and that what he did in the way of addressing letters was simply an accommodation. The chief dispute arises over a claim on plaintiff's part that he orally exercised his option within the time fixed, and that the option contract then and thereupon became a contract of sale. This is denied by defendants, and they further say that as a matter of law there could be no binding acceptance except by a payment or tender of the purchase price within the period fixed by the option. The first is, of course, a question of fact, and the latter of law, or of mixed law and fact. We shall first take up the legal proposition, for if defendants' contention in this respect be sustained the decree is correct, for the reason that it is not contended that plaintiff paid or offered to pay the purchase price before October 17th, the time when, by the broadest construction, the option expired.

The only fixed rule regarding the manner of the exercise of an option under a contract granting it, is to discover from the language of the instrument, construed in the light of competent parol testimony, the

1. OPTIONS:  
manner of  
exercise: how  
determined.

intent of the parties with reference thereto. It may be that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land—the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case, there is an election to sell, upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and in the other

there is an election to take the land upon the terms proposed, payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into.

It is important in such cases to distinguish that which pertains to the performance of a contract from that which pertains to its making. To make any sort of a contract,

2. SAME: there must be a meeting of minds upon a  
acceptance. given subject. An offer without acceptance

is not a contract, and as a rule the acceptance to be binding must be in accord with the terms of the offer, and not in some other manner. In other words, the party making the offer may prescribe the mode of acceptance, and to constitute a binding contract this method must be followed. The distinctions here noted are pointed out with great clearness in *Watson v. Coast*, 35 W. Va. 463 (14 S. E. 249). See, also, *Pomeroy on Contracts*, section 387; *Minneapolis Co. v. Cox*, 76 Iowa, 306; *Bundy v. Dare*, 62 Iowa, 295; *Lockman v. Anderson*, 116 Iowa, 236; *Myers v. Stone*, 128 Iowa, 10; *Page on Contracts*, sections 48 and 49.

Now, going to the option in this case, it appears that defendants agreed to sell to plaintiff at his option any time on or before October 17, 1906, one hundred and seven-

3. OPTION CON- upon the following terms, "\$17,550.00 on  
TRACT FOR SALE OF LAND: delivery of the deed." Defendants also  
exercise of option.

agreed that if Breen sold the land at any time within the option they would make deed to the purchaser and would make abstract, showing perfect title. They also agreed to accept the purchaser's notes for the deferred payments, and to take a mortgage securing the same. It will be noted that the payment of the purchase price was to be made on delivery of the deed; that Breen had authority to sell the land at any time covered by the option, and that defendants agreed to make deed to the

purchaser and to make abstract showing perfect title. The agreement was to sell the land for \$17,550 to plaintiff at his option exercised at any time before October 17th, payment to be made on delivery of the deed with abstract showing perfect title, and the deed was to run to Breen or to any person to whom he might sell. We are constrained to hold that payment of the purchase price was not essential to the completion of the contract. Plaintiff might make his election in any lawful method before the expiration of the time limit, and would be compelled in that event to make tender of the purchase price within a reasonable time and demand a deed either to himself or to the party to whom he had sold. It was recognized that plaintiff had something to sell or transfer before making payment for the land; and the delivery of the deed and the payment of the purchase price were simply dependent covenants which did not go to the formation of the contract but to its performance. These views find support in *Gradle v. Warner*, 140 Ill. 123 (29 N. E. 1118); *Gibson v. Heating Co.*, 128 Ind. 240 (27 N. E. 612, 12 L. R. A. 502); *Bogle v. Jarvis*, 58 Kan. 76 (48 Pac. 558); *Howe v. Watson*, 179 Mass. 30 (60 N. E. 415); *Mason v. Decker*, 72 N. Y. 595 (28 Am. Rep. 190); *Ellsworth v. R. R.*, 31 Minn. 543 (18 N. W. 822); *Myers v. Stone*, 128 Iowa, 10; *Clark v. Gordon*, 35 W. Va. 735 (14 S. E. 255); *Peterson v. Chase*, 115 Wis. 239 (91 N. W. 687); *Boston Co. v. Rose*, 194 Mass. 142 (80 N. E. 498); *Primm v. Wise & Stern*, 126 Iowa, 528; *Webb v. Hancher*, 127 Iowa, 269.

With the law question settled, we go now to the controlling question of fact, Was there an acceptance of the option by the plaintiff, or such an election on his part as bound him to perform the contract? In this connection we may say that the statute of  
4. SAME: statute of frauds. frauds cuts no figure. Plaintiff is not the party sought to be charged, and to answer the requirements



of that statute it is only necessary that the contract be signed by the party to be charged, etc. Of course, to make a valid and enforceable contract of an option there must be an unqualified acceptance thereof and a full performance of all conditions precedent; but the contract when completed need not be in writing unless required by statute. *Perkins v. Hadsell*, 50 Ill. 216; *Yerkes v. Richards*, 153 Pa. 646 (26 Atl. 221, 34 Am. St. Rep. 721).

This brings us to the disputed fact question in the case: Was there an unqualified election by plaintiff communicated to defendant to accept the option, and such a

5. SAME:  
acceptance  
of option:  
evidence.

meeting of the minds as to make a valid and enforceable obligation against the defendants? A reading of the correspondence which passed between the parties, and to which we have already referred, clearly shows that there is nothing in these letters which constitutes an unqualified election to accept the option and become bound to pay the purchase price within the time limited. But appellant contends that there is testimony of an oral acceptance communicated to the defendant within the time limited by the option. This acceptance could only be made by plaintiff in person, or by someone having authority from him to do so. There is testimony from three or four people, who did not represent plaintiff in the matter of the land deal, to the effect that they told defendants they thought Breen would take the land. But the only real testimony as to an acceptance by plaintiff is the following: Mr. Mayne was anxious to know whether plaintiff intended to exercise his option, and he requested one Hubbard to ask him, Breen, what he intended to do. In response Breen said: "I have been a good fellow so far, and I guess I will have to take the land." This was said in defendant's presence, but not to him, and plaintiff's conduct thereafter shows that he did not intend this to be an election on his part to take the land, but rather an expression of his opinion as to what

he would do in the future. It was not regarded by defendants as an election to take the land. The correspondence between the parties after that date indicates that they still regard the matter as an unaccepted offer. It will not do to establish a rule in these cases which will allow an optionee to "play fast and loose" as interest may dictate. The acceptance of the option, or the election when made, must be unqualified and unequivocal, must be communicated to the party giving the option in no uncertain manner, and be such that after it is exercised it becomes binding upon the party exercising it. That is to say, it must assume the form of a contract proper as distinguished from a mere option or offer. We do not think the testimony in this case shows such an election to take the land or to accept defendant's offer as made a binding contract. Moreover, we may say that we do not think defendants did anything to prevent plaintiff from indicating his election or acceptance of the offer of sale. Plaintiff attempts to make such a showing, but this is negatived by defendants' testimony. The letter written by McNider after his return from St. Louis is not binding on defendants, and, even if it were, it would amount to nothing more than a waiver of the time for the payment of the purchase price.

We have gone over the record with care, and find no reason for disturbing the decree. It is therefore *affirmed*.

SHERWIN, J., taking no part.

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R. A. ELZY, Appellee, v. THE ADAMS EXPRESS COMPANY,  
Appellant.

**Carriers: DELAY IN SHIPMENT: SPECIAL DAMAGES.** Where an express company had notice at the time of shipping a shaft for a steam shovel outfit that the outfit had broken down, and that it and the crew of men operating the same would remain idle until the shaft was received, the company, if negligent, was liable

in damages for the actual rental paid by plaintiff for the use of hired machinery, the fair rental value for the use of his own machinery, and the wages actually and necessarily paid the workmen.

**Same: NOTICE.** Where the shipper informed the agent that he was shipping an iron shaft of considerable weight by express rather than by freight to save time, that a steam shovel outfit had broken down and that it and the crew would be idle until the shaft was received, the notice was sufficient to apprise defendant that special damages would result to plaintiff if shipment was delayed.

**Credibility of witnesses: STATEMENT OF COURT: EFFECT.** A statement of the trial court that he believed two witnesses testifying adversely to each other concerning a state of facts were both honest in their statements and equally credible in character, did not amount to a finding that the evidence was in equipoise on the disputed question, so as to invalidate a conclusion in favor of one contention which had support in the other circumstances of the case.

**Damages: RENTAL VALUE.** The owner of machinery may recover damages for its rental value when deprived of its use through the fault of another, upon proof of the value of its use, although it is not shown that the same had a rental value.—McClain, J., dissenting.

*Appeal from Marshall District Court.*—HON. C. B. BRADSHAW, Judge.

SATURDAY, FEBRUARY 20, 1909.

THIS is an action for damages against the defendant as a common carrier for negligent delay in the delivery of a consignment. The damages claimed consisted of a number of items. There was a trial to the court without a jury. Judgment for the plaintiff for a part of his claim only. Both parties appeal. The defendant first perfected its appeal, and is designated as appellant.—*Affirmed* on defendant's appeal. *Reversed* on plaintiff's appeal.

*Anthony C. Daly*, for appellant.

*Binford & Farber*, for appellee.

EVANS, C. J.—In January, 1906, the plaintiff was a general contractor, and had been such for many years prior thereto. At the time stated he was engaged in the performance of a contract for grading and constructing a railroad right of way for the Big Four Railway Company near Indianapolis, Ind. The machinery in use by him for such purpose consisted of a steam shovel, two locomotives, forty-two dump cars, and a spreader car, with crews numbering eight men. The steam shovel was the property of the Iowa Central Railway Company, and was leased to the plaintiff at a specified rental per day. The locomotives were the property of another railway company, and, in like manner, were leased to the plaintiff. The other property enumerated belonged to the plaintiff. On January 7, 1906, the swing shaft of the steam shovel was broken, rendering the operation of the steam shovel impossible until another could be obtained. The stoppage of the steam shovel rendered it impossible to utilize the rest of the outfit or crew. The foreman at Indianapolis wired the facts to the home office at Marshalltown. Thereupon another shaft was obtained from the Iowa Central Railway Company at Marshalltown, and was delivered to the defendant for immediate shipment to the plaintiff as consignee at Indianapolis, Ind. The business at Marshalltown was transacted for plaintiff by one Baumgardner, his bookkeeper. Baumgardner personally saw the local agent of the defendant company, and explained to him the reasons for the shipment and the importance of a quick delivery. He stated to him, in substance, that plaintiff's outfit would be idle until the shaft could be obtained, and stated, also, what the outfit consisted of. The shaft weighed from three hundred to five hundred pounds, and was delivered to the defendant at such time on the 8th of January that in the ordinary course of transportation it would reach Indian-

apolis the next day. The bill of lading which usually attends the shipment actually did reach Indianapolis on the next day. But through some negligence of the defendant the shaft itself was sent to some other destination, and did not reach the Indianapolis office until January 20th. The plaintiff could not obtain the shaft in the market at any other place, nor could one have been manufactured in a less period of time than three weeks. The plaintiff was therefore helpless to proceed with his work until this identical shaft should reach him. The items of damage claimed by him were the rentals actually paid by him for the use of the steam shovel and the locomotives during the period of negligent delay, and the wages actually and necessarily paid by him to the men in charge and the fair rental value of his own property, namely, the dump cars and the spreader car during such period of delay. The court allowed him the rentals and wages actually paid by him, but refused to allow him the rental value of his own property. From the judgment of allowance the defendant appeals. From the refusal to allow the plaintiff appeals. We will consider first the questions arising upon the defendant's appeal.

I. It is contended by the defendant that the damages allowed by the lower court were remote and consequential and were not within the contemplation of the parties

1. CARRIERS:  
delay in  
shipment: special  
damages.

ties when the contract of shipment was entered into. The lower court found that at the time of the shipment the defendant had notice of the very situation as it existed, and that it therefore knew the consequences which would result from negligent delay in delivery. This finding of the lower court has sufficient support in the testimony. The plaintiff has sued in tort and not on the contract. The present weight of authority is that where defendant has notice at the time of shipment of the existing facts out of which special damages would naturally arise to plaintiff by negli-

gent delay in delivery, the defendant may be held liable for such special damages. The general rule in torts is that all damages naturally and proximately resulting from the injury are recoverable. This rule is construed to include special damages, such as are involved in this case, where the carrier has notice of the fact that delay in the delivery of goods will result in special damage to the shipper. *Cowan v. Western Union Telegraph Co.*, 122 Iowa, 379; *Weston v. Boston & Maine Ry. Co.*, 190 Mass. 298 (76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330); *Missouri & Pacific Ry. Co. v. Peru Van Zant Co.*, 73 Kan. 295 (85 Pac. 408, 87 Pac. 80); *Central Trust Co. v. Savannah & W. Ry. Co.* (C. C.) 69 Fed. 683.

II. It is contended by the defendant that the notice to the local agent at Marshalltown was not sufficiently definite to bring the case within the rule of special damages.

2. SAME:  
notice.

The testimony of Baumgardner on that question is as follows: "Bartmess [the local agent] asked me about the weight, and said: 'Why don't you ship it by freight, and save some expense?' I told him the steam shovel was broken down, and we were in a hurry to get it over there to get the shovel in operation. I told him the whole crew was idle until we could get the shaft over there; that the whole outfit was idle until we could get the shaft over there. I told him the outfit consisted of a steam shovel with two engines, forty-two dump cars, and a spreader car, and the men, of course, that were necessary to operate them, known as a steam shovel gang or outfit. I do not remember that I said anything at that time about the number of men that were employed on it." Assuming this testimony to be true, as the court found it to be, we think it was sufficient to bring the plaintiff within the rule as to special damages. It clearly conveyed knowledge to the defendant that special damages of the nature now claimed would result to plaintiff if shipment

were delayed. This is a fair compliance with the spirit of the rule requiring notice in such cases.

III. Bartmess, the local agent of the defendant company, denied the statements of the witness Baumgardner as to the alleged notice. The trial court in the discussion

of this evidence stated that he believed both  
3. CREDIBILITY OF WITNESSES: statement of court: effect. witnesses to be honest in their statements and equally credible in their character, but

he found the facts nevertheless in accordance with the affirmative testimony of the witness Baumgardner. Counsel for defendant argues earnestly that the statement of the court concerning the two witnesses amounted to a finding that the evidence was in equipoise on this question, and that, therefore, there was no preponderance in favor of the plaintiff. The argument in support of this contention is ingenious, but not sound. The court did not find that the testimony of the two witnesses was equally credible or of equal weight. It found the facts against the testimony of Bartmess without imputing to him any intentional false swearing. The circumstances of the case corroborate the testimony of Baumgardner. The very fact that a non-perishable article weighing from three hundred to five hundred pounds should be sent by express, instead of by freight, was itself a circumstance which might naturally attract attention to itself, and tends to corroborate plaintiff in his statement that Bartmess inquired why it was shipped by express instead of by freight. The defendant's point in this respect is not well taken.

IV. The plaintiff introduced evidence of the rental value of the use of his own property, namely, the dump cars and the spreader car during the period of delay. This

consisted of the testimony of two witnesses,  
4. DAMAGES: rental value. each of whom testified that in his opinion the smaller cars were each worth fifty cents a day, and the larger ones \$1 a day, and the spreader car \$1.25 a day, making a total of \$275. This testimony was

not based on any market rental rate, because there was none, and the defendant urged objections to its competency and sufficiency, both at the time it was offered and at the time of the submission of the case. The court admitted the evidence as competent, but refused to allow these items in its final judgment, and as a reason for such refusal stated that he "thought it was too much in the nature of profits." The testimony on the subject was not strong, but it was uncontradicted. The plaintiff urges on his appeal that the items testified to constituted a proper measure of damages, and that they were not in the nature of profits, as the term is used in such cases, and that he is entitled to a reversal on that ground and to an order for an allowance of the items. If the court had refused the items because of the insufficiency of the testimony, we should deem the question quite beyond our reach. The writer is of the opinion that the finding of the court should be so construed, and that the reason given by the court was intended to characterize the weight and sufficiency of the evidence, rather than the nature or competency of it. If this position were accepted, it would require an affirmance of the judgment on both appeals. If, however, the reason given by the court is to be deemed as referring to the nature of the evidence as improper measure of damages, it can not be sustained. As a measure of damages, it is of the same nature as the rentals which the court actually allowed. The majority of the members of the court are of the opinion that the finding of the court should be construed as equivalent to an allowance of the items so far as the weight of evidence is concerned, but a rejection of the same, because not proper measure of damages. On this view there must be a reversal on plaintiff's appeal and an affirmance on defendant's appeal. In pursuance of the construction thus put upon the findings of the lower court, plaintiff will be permitted to take judgment in this court for the items in question.



*Affirmed* on defendant's appeal. *Reversed* on plaintiff's appeal.

McCLAIN, J. (dissenting).—On plaintiff's appeal the holding of the majority is that there should be a recovery of rental value of plaintiff's machinery while it lay idle on account of defendant's fault, although it does not appear that such machinery had a rental value or was kept for rent or could have been rented. As it seems to me, this is plainly wrong. Profits lost may be allowed where reasonably definite and certain; but here there was not a suggestion in the evidence of even a possibility that plaintiff would have received any rental for his machinery if defendant's contract to carry promptly had been performed; nor is there any suggestion that any equivalent of rental value of his own machinery was lost through defendant's fault. The rule that in such a case as this the recovery should be limited to compensation, which should not include damages which are merely speculative and wholly uncertain, is so well settled that I do not care to cite authorities or do more than express my dissent.

I think that on plaintiff's appeal there should be an affirmance.

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EMMA R. GRIFFITH V. MERCHANTS LIFE ASSOCIATION OF  
BURLINGTON, IOWA, Appellant.

**Benefit insurance: PAYMENT OF ASSESSMENTS: LAPSE OF POLICY.** An assessment association authorized a bank to receive assessments from its members, acknowledge receipt and remit the same, but directed it not to receive assessments past due unless specially authorized. The decedent was a depositor at the bank and paid his assessments there and at one time told the cashier to pay his assessments, if at any time he neglected it, and to charge the same to his account. *Held*, that the alleged agreement with the cashier did not amount to payment of an assessment of which the cashier had no notice, but by reason of its nonpayment the policy had lapsed.

**Same: PLEADING: AMENDMENT AFTER TRIAL.** Where no issue as to 2 the validity of an assessment was raised until after submission of the cause, that question could not be brought into the case by amendment without first setting the submission aside and giving the association an opportunity to be heard

*Appeal from Taylor District Court.*—HON. H. K. EVANS,  
Judge.

SATURDAY, FEBRUARY 20, 1909.

ACTION in equity to recover on an insurance policy. There was a judgment for the plaintiff, from which the defendant appeals.—*Reversed.*

*Haddock & Son* and *Seerley & Clark*, for appellant.

*W. M. Jackson*, for appellee.

SHERWIN, J.—The appellant is an assessment association, and in 1903 it issued a policy of \$2,000 on the life of Sheridan D. Griffith. All dues and assessments were regularly paid until April 30, 1907, at which time there became due on said policy an assessment or call that was made in March. Whether this assessment was paid is the only question for determination. The defendant had made the Citizens' Bank of Bedford, Iowa, its depository, and had directed its certificate holders in that vicinity to pay their calls at said bank. The authority under which the bank acted for the defendant, and its only authority to transact its business, was contained in a writing which appears in the record. The authority therein conferred upon the bank, so far as collections were concerned, was contained in the following excerpts from the writing: "We furnish you with the necessary remittance blanks. Our members will present deposit slips. Stamp the call 'paid' and mail the addressed postal card to us. . . .

Unless specially authorized, do not receive any money after the close of the month in which this call is payable. . . . Blank deposit tickets will be prepared by our solicitors for signature, for such cash as may be left with you on our account, and the business will be conducted in such a manner as to give you the least possible annoyance." The assessments under this policy were made quarterly, and were paid at the bank. Mr. Griffith paid the January, 1907, assessment, and at the time of making such payment he said to the cashier of the bank: "Now, my time was pretty near up for this last assessment. . . . Now, if I should ever forget to come in and pay my assessment, you pay it for me and charge the same to my account." To this statement and request Mr. Long, the cashier, answered: "All right." Mr. Griffith was a depositor in the bank in question, and the record shows that at the time of the January talk with the cashier, and at all times thereafter until his death on the 14th of May, 1907, he had a balance due him of more than enough to pay the April assessment. The call for this assessment was made in March and directed to Mr. Griffith. He did not pay it, nor was it paid by the bank, and there is no evidence tending to show that either the bank or Mr. Long, its cashier, had any knowledge of the call that had been sent to Mr. Griffith.

The appellee contends that Mr. Griffith directed the bank to pay his assessments out of the funds in its hands and charge the same to his account, and that, if they failed to do so, it was the negligence of the defendant's own agent and would not defeat her right to recover. We are of the opinion that the contention can not be sustained on any sound principle of law or equity. The authority given the cashier by Mr. Griffith was limited. He had no authority to pay an assessment from Mr. Griffith's funds unless it was necessary to do so to protect Mr. Griffith against his

1. BENEFIT  
INSURANCE:  
payment of  
assessments:  
lapse of  
policy.

own neglect. In other words, Mr. Griffith authorized the cashier to pay only when it became apparent to him that Griffith had himself forgotten the assessment and that the policy would lapse unless it was paid by him. The bank was not the general agent of the defendant as to any matter. On the contrary, its power was limited. It could accept payment of calls, stamp the calls paid, and mail the addressed postal card and remit at the end of the month. It was no part of the bank's employment to push collections for the defendant. Nor was it employed to protect members of the defendant association against their own carelessness or neglect. The assessment or call in question was sent directly to Mr. Griffith by the defendant. It did not pass through the bank, nor did the bank or its cashier have express notice that such a call had been made, or that Mr. Griffith had neglected to pay it. The only knowledge that the bank had was that Mr. Griffith was a member of the defendant association when he paid the assessment in January, and that a call had been made on other members thereof at the time in question.

It is said, however, that the bank should have had in mind Mr. Griffith's membership, and should have known that a call had probably been made upon him for the last assessment. If the appellee's contention as to this be conceded, it still remains true that, as Mr. Griffith had the right to pay the call directly to the home office, the bank acting as the agent of the defendant was not bound to know that he had not so paid it or that it was unpaid when the time within which payment could have been made had expired. That the alleged agreement did not constitute a payment is clear. It does not bring the case within the rule announced in the *British & American Mortgage Co. v. Tibballs*, 63 Iowa, 468, and *Griffin v. Erskine*, 131 Iowa, 444, relied upon by the appellee.

After the close of the trial, but on the same day, the plaintiff, without notice to or knowledge on the part of

the defendant, filed an amendment to the petition alleging that the deceased was not in arrears at the time of his death, and that all sums and assessments had been fully paid. This amendment states that it was made to conform the pleadings to the proof. No issue was theretofore made as to assessments. In her petition the plaintiff specifically alleged as follows: "Your orator further shows that, by the rules and regulations of the said defendant, certain small amounts of dues became due and owing from Sheridan D. Griffith on account of his membership which should have been paid on or before April 30, 1907." And the amount thereof was alleged to be \$5.60. Moreover, it was stipulated on the trial that an "assessment was issued or call made for the month of April, 1907," and, further, "that said assessment or call has never been paid to the company, and at the present time remains unpaid." It is manifest that the amendment to the petition not only did not conform to the proof, but that it directly contradicted the original petition and the stipulation that had been made during the trial. The trial court held that the assessment had been paid and refused to consider the question raised by the amendment in question. It is now too late to urge the proposition that no legal assessment was shown. If the appellee concluded, after the submission in the lower court, that such an issue should have been made, steps should have been taken to set aside the submission, and the appellant should have been given an opportunity to meet the changed front.

For the reasons pointed out, the judgment must be *reversed*.

E. P. BARRINGER, Appellee, v. HENRY E. DAVIS and wife,  
Appellants.

**Public lands: GRANT IN AID OF RAILROADS: UNSURVEYED LANDS: EF-**

**1 FECT OF RESURVEY.** Where an entire government section bordering upon a lake has been granted to the State to aid in the construction of a railroad, and upon compliance by the railway company with the terms of the grant a patent has issued conveying the section to the State, the government no longer has any legal or equitable title therein; and if by mistake some small part of the subdivision was left unsurveyed its subsequent survey by direction of the Interior Department will not effect a restoration of the same to the public domain, but any apparent title thereto either in the government or State is held in trust for the benefit of the railway company and its grantees. Where, however, the meander line, which is not ordinarily a boundary, is established so far from the shore line as to indicate gross error or fraud and the government has done nothing to part with its title to the unsurveyed land, it may cause a resurvey of the same and dispose of it as government land. In the instant case the unsurveyed land is held to be part of the original grant.

**Boundaries: MEANDERED LAKES: EXCESS LAND: TITLE: ESTOPPEL.** Where

**2** the original government survey coincides with the shore of a lake and terminates at meander posts on the lake shore, which is marked as the boundary, the shore and not the meander line constitutes the boundary; and a conveyance with reference to such survey by the patentee of the government subdivision, to which it had held the title for a long series of years without questioning the survey, carries the title to the shore of the lake, and the title to the land beyond the meander line can not thereafter be questioned, in the absence of any showing of an intention to reserve the same, or of knowledge of the discrepancy between the survey and the actual acreage, or that the grantor was misled as to the true situation.

**Same: RESURVEY OF PATENTED LAND: JURISDICTION.** Where the gov-

**3** ernment has parted with its title to lands and a controversy arises between persons asserting conflicting claims under grants or patents based upon an official survey, such survey is conclusive though grossly incorrect, and the land department has

no jurisdiction to affect the rights of the parties by a resurvey and issuance of a new patent.

**Conveyances: REFERENCE TO PLATS: EFFECT.** Where lands are conveyed  
4 according to the official plat of a survey thereof, the plat and all its notes, lines, descriptions and land marks become a part of the conveyance the same as though such descriptive features were written out therein, and are controlling so far as the limits of the tract are concerned.

**Conveyances: DESCRIPTION: NATURAL OBJECTS: COURSE AND DISTANCE.**  
5 Where the description in a deed refers to natural objects, as a lake shore, or even a marked line, they will control both course and distance and carry all the land within their boundaries though much greater in quantity than that mentioned.

McClain, J., dissenting.

*Appeal from Clay District Court.*—HON. A. D. BAILIE,  
Judge.

SATURDAY, FEBRUARY 20, 1909.

ACTION in equity to quiet plaintiff's title to land. The defendants deny plaintiff's claim of title, and by cross-bill ask that the same be quieted in themselves. Decree for plaintiff, and defendants appeal.—*Reversed* on rehearing.

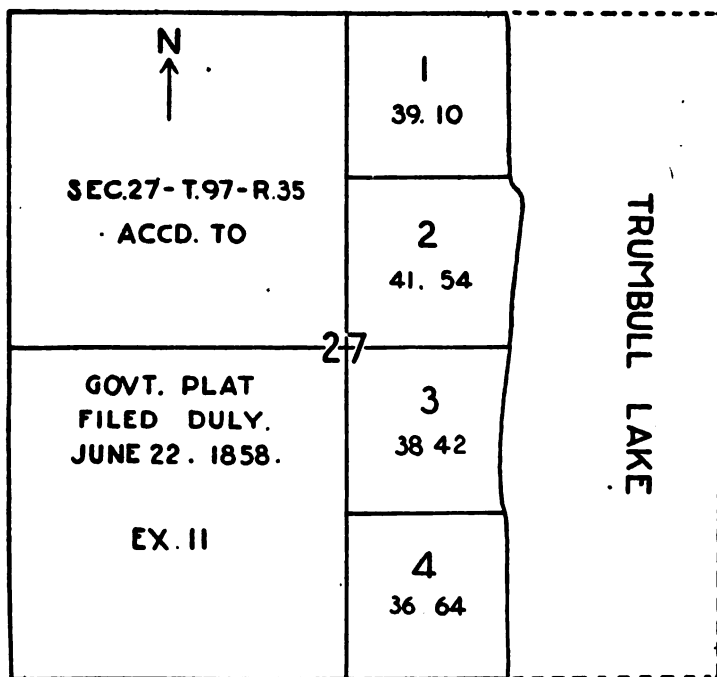
*Buck & Kirkpatrick and Glass, McConlogue & Witmer,*  
for appellants.

*E. B. Evans,* for appellee.

WEAVER, J.—The land in controversy is a part of section twenty-seven, township ninety-seven, range thirty-five, in Clay County, Iowa. The original government survey of this section was completed about the year 1857, and by act of Congress, approved May 12, 1864, it was included in a grant of land to aid in the construction of a railroad crossing the northern portion of this State. The company which first undertook the construction of this

road and to secure the benefit of the grant was known as the McGregor & Western Railroad Company whose rights were subsequently acquired by the Chicago, Milwaukee & St. Paul Railway Company. The original survey developed the fact that the eastern portion of that section was covered or bordered by a permanent body of water known in the record as Trumbull Lake, and for the purposes of measurement of the land area a meander line was established on that side. According to the report as disclosed by the records the section was surveyed and mapped as indicated by the following plat which for convenience of reference we designate,

PLAT A.



These records show that, following the usual method,



the southwest corner of the section was first established, and that from this point the south line, being the line between sections twenty-seven and thirty-four, was run eastward forty chains for the quarter post, and at fifty-eight chains and twenty links it intersected the lake, where a post was set for the meander course. Returning to the southwest corner the western line was then established, and from the northwestern corner of the section the north line, being the line between sections 27 and 22, was run forty chains for the quarter post, and at fifty-nine chains and sixty links it intersected with the lake, where another meander post was set. The meander line was then run from the post at the southeast intersection with the lake as above indicated in a northerly direction, changing the course somewhat at three intermediate points, and closing upon the meander post at the northeast intersection with the lake as represented upon Plat A. As thus surveyed, the north half of the section, with which alone we are at present concerned, was subdivided into the northwest quarter containing one hundred and sixty acres; lot one containing thirty-nine and ten one-hundredths acres, and lot two containing forty-one and fifty-four one-hundredths acres, making an aggregate in the half section of two hundred and forty and sixty-four one-hundredths acres. It will be noted that Plat A of the original survey shows no meander line as distinguished from the shore line of the lake, and lots one and two are there described and platted as covering all of the land up to the lake shore. The necessary inference from the survey and plat is that the meander line thus established coincided with the shore line, or so nearly so that they were mapped as one.

The railway having been constructed, the State of Iowa which received the grant for that purpose issued its patent to the Chicago, Milwaukee & St. Paul Railway Company for said lands with others, under date of April 26, 1880, describing the tracts as shown by the original

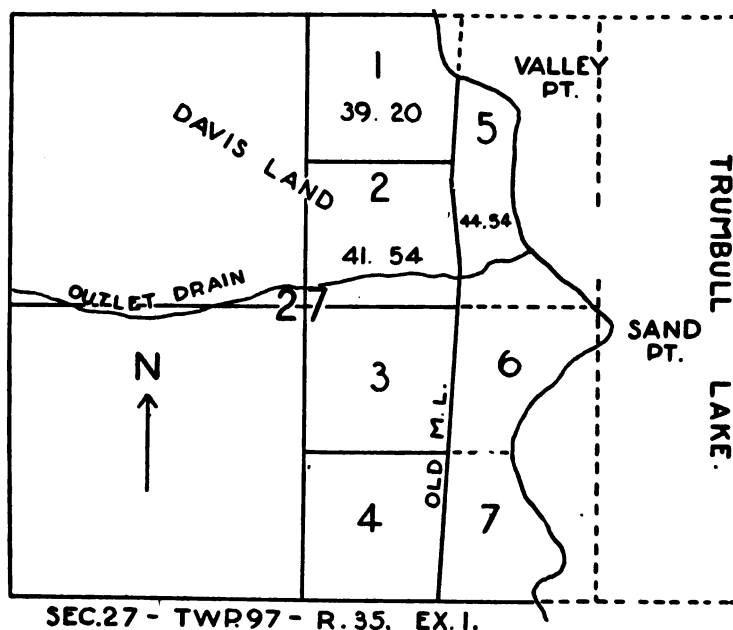
survey. Soon after the issuance of patent to the northwest quarter, and lots one and two of section twenty-seven, they passed by proper conveyance from the railway company to the Iowa and Dakota Land Company, which in 1886 entered into a written contract to convey said described lands to James Valley. At or soon after the date of this contract, Valley entered into possession of the property, making use of it as a farm, and on February 16, 1895, obtained a deed of conveyance therefor pursuant to the terms of his said contract of purchase. On December 5, 1895, Valley conveyed to J. W. O'Neil, who some months later conveyed the same to John Steen, by whom on February 23, 1899, it was conveyed to Ellen Valley, wife of James Valley. Valley and wife appear to have been divorced about this time, and the latter quitclaimed her title to the former on February 24, 1900. A year later James Valley conveyed to James E. Moore, who on August 7, 1901, conveyed to Henry E. Davis, who is the principal defendant herein. In each of these conveyances, the land is described by subdivisions as indicated by the original survey, to wit, the northwest quarter and lots one and two in section twenty-seven. In most of them no mention is made of the number of acres, but in the deed from the railway company to the land company the description is stated as containing two hundred and eighty and seventy-four one-hundredths. In the deed from James Valley to James E. Moore it is stated to contain three hundred and twenty-one acres, while in the above-mentioned deed from Moore to Davis the area is said to be two hundred and forty acres. A year after the date of the last-named deed Moore executed a second deed to Davis, purporting to be to the land lying between lots one and two and Trumbull Lake, and reciting that such conveyance may already have been effected by the deed of August 7, 1901. It is the claim of the defendant that the title thus derived vested in him

and his grantors, under the railway grant, a good and indefeasible title to all the lands in the north half of section twenty-seven not covered by the lake, including such land, if any, be the same more or less, as lies between the meander line and the shore of the lake. He also alleges that on obtaining the contract of purchase as aforesaid in 1886, his grantor, James Valley, took possession of all of said land to the lake shore under color of title and claim of right, and that from said date down to the commencement of this action the said Valley and his successive grantors have continued in open, notorious and adverse possession of said premises, and that by reason thereof the title now held by said defendant and derived as aforesaid is invulnerable.

The plaintiff asserts title to so much of the north half of section twenty-seven as lies between the lake shore and the meander line established by the original survey, and traces his claim as follows: In the year 1900 one J. C. Chapman and Myron Valley, a son of James Valley, petitioned the commissioner of the General Land Office at Washington, representing that by means of mistakes in the original survey in the location of meander lines about the shores of different alleged lakes in that vicinity a large area of arable lands had been left unsurveyed, and asked that an order for its survey be made, to the end that such lands might be opened to settlement and improved like other portions of the public domain. Upon this application M. P. McCoy was appointed engineer to make a report and survey of the tract or tracts thus designated. Pursuant to this authority the engineer proceeded to make a survey of more or less extensive tracts in eleven different sections in townships ninety-six and ninety-seven. A report of this survey was made in the year 1901, and some time thereafter the report was approved by the department at Washington. The manner in which this latter

survey affects the lands in section twenty-seven is shown by the following plat:

PLAT B.



It will be observed that as traced by this survey the original meander line does not close upon the lake shore at the south end, but is located at a point some distance west therefrom, thus leaving between said line and the lake a body of land, a portion of which, lying within the north half of the section and marked lot five, containing forty-four and fifty-four one-hundredths acres, is the subject of the dispute now under consideration. McCoy's report, so far as it affects this particular tract, is, in substance, that running east from the southwest corner of that section a distance of fifty-eight chains and twenty links for the meander post as indicated by the original survey said line fell short of intersection with the lake, and had

to be extended twelve chains and fifty links further to reach the shore. As we understand his notes the southwest corner of the section and the quarter post on the south side as established by the original survey were discovered and recognized, but no artificial monument of the original meander corner appears to have been found. The engineer marked the point reached at fifty-eight chains and twenty links east from the southwest corner for the old meander corner, and at a point twelve chains and fifty links easterly therefrom established and marked a new corner. After the approval of the later survey a patent was issued to said lot five to the State of Iowa for the use of the Chicago, Milwaukee & St. Paul Railway Company, to which the State thereafter issued its patent. In 1902 the railway company quitclaimed its interest in the land to plaintiff. Upon the trial of the issues joined upon these conflicting claims of title the district court found for the plaintiff, and the defendants appeal.

The foregoing statement makes it clear that the appellee stands in the shoes of the railway company, and can not successfully assert any claim or title to the land which would not be available to said company had it never quitclaimed to him. The land grant of May 12, 1864, and subsequent patent to the State of Iowa in trust for the purposes of said grant had the effect to vest in the railway company the equitable title to section twenty-seven, not merely the marked subdivisions thereof, but to the entire section, or at least to so much thereof as had not already been otherwise appropriated; such title vesting not later than the date when the road was completed. The land grant having been made to the State, and the railway company having constructed the road according to the terms of the grant, the United States no longer had title, legal or equitable, to any part of said section, and if by any mistake any part of it had been left unsurveyed, its subsequent survey under

1. PUBLIC LANDS:  
grant in aid  
of railways:  
unsurveyed  
land: effect  
of resurvey.

an order from the Interior Department would not have the effect to restore such land, or any part of it, to the public domain. Upon the fulfillment by the company of the provisions of the grant it became entitled to receive a patent therefor from the trustee, and said title, when received, related back to the date of the grant. *Grinnell v. R. R. Co.*, 103 U. S. 739 (26 L. Ed. 456); *Schulenberg v. Harriman*, 88 U. S. 44 (22 L. Ed. 551); *Wisconsin R. R. v. Price*, 133 U. S. 509 (10 Sup. Ct. 341, 33 L. Ed. 687); *Deseret Salt Co. v. Tarpey*, 142 U. S. 241 (12 Sup. Ct. 158, 35 L. Ed. 999).

The fact, if it be a fact, that the original patent described the section by its subdivisions only can make no difference, so long as the other conceded fact exists that the grant included the entire section, and that the benefit of said grant had been fully earned by said railway company. The title thus acquired could be successfully asserted by said company, and by its grantors against the world, and if any apparent title was left, either in the United States or in the State of Iowa, it was held upon trust, and subject to the right of the company to demand and receive the patent perfecting in itself the record of the title which it had fully earned. There can be no doubt that the original patent was issued by the State and received by the railroad company, with the understanding that it covered all of the north half of section twenty-seven.

The plat of the survey showed lots one and two extending to the water's edge. The minutes of the survey located both the southeast and the northeast meander corners on the margin of the lake. The meander line is not established as a boundary, but a line drawn from point to point along the shore, disregarding its minor sinuosities, and is used, not to mark the limits of the tract of land adjacent thereto, but simply as a basis from which to measure such tract and determine the number of acres for which the government will demand payment; and, when payment

for such acreage is made, the title of the purchaser extends to the water's edge, even though in places there be small unmeasured tracts lying outside of the meander line. *St. Paul & Pac. R. R. Co. v. Schurmeir*, 74 U. S. 272 (19 L. Ed. 74); *Hardin v. Jordan*, 140 U. S. 380 (11 Sup. Ct. 808, 838, 35 L. Ed. 428); *Ex parte Davidson* (C. C.) 57 Fed. 883; *Schlosser v. Cruickshank*, 96 Iowa, 418; *Ladd v. Osborne*, 79 Iowa, 95; *Everson v. Waseca*, 44 Minn. 247 (46 N. W. 405); *St. Paul Railway Co. v. Railroad Co.*, 26 Minn. 31 (49 N. W. 304); *Heald v. Yumisko*, 7 N. D. 422 (75 N. W. 806). This rule is subject to the exception that if by a mistake or fraud in the survey a meander line be run where no lake or stream calling for such expedient exists, or if it be established at such excessive distance from the actual shore as to leave between its course and the shore an excess of unsurveyed land so great as to clearly and palpably indicate fraud or mistake in the survey, then the courts will, for equitable reasons, treat the meander line as a boundary. *Mitchell v. Smale*, 140 U. S. 406 (11 Sup. Ct. 819, 840, 35 L. Ed. 442); *Grant v. Hemphill*, 92 Iowa, 218. And where such mistake has occurred, and the United States has not in any way parted with its right to the land so left unsurveyed, the proper department of the government may cause the survey to be made, and dispose of such tracts as portions of the public domain. But where the United States has parted with its title, a new survey can have no effect upon the rights of those holding under prior grants or patents. *St. Paul Railway Co. v. Schurmeier*, 74 U. S. 289 (19 L. Ed. 74); *Kirwan v. Murphy*, 109 Fed. 355 (48 C. C. A. 399); *St. Paul Railway Co. v. R. R. Co.*, 26 Minn. 31 (49 N. W. 303); *Hardin v. Jordan*, 140 U. S. 400 (11 Sup. Ct. 808, 838, 35 L. Ed. 428); *Mitchell v. Smale*, 140 U. S. 406 (11 Sup. Ct. 819, 840, 35 L. Ed. 442); *Moore v. Robbins*, 96 U. S. 530 (24 L. Ed. 848); *Kean v. Roby*, 145 Ind. 228 (42 N. E. 1011).

It follows that when the railway company has fulfilled the conditions of the grant, its right to all of that portion of the public domain within the limits of section twenty-seven became perfect, and the issuance of the later patent in 1901 vested it with no other or higher right than it would have possessed had such instrument issued in 1880. We are unable to see how the second survey gives to, or takes from, either party to this controversy any right which might not have been insisted upon with equal effect had such survey never been made. Where a grant of land to a railway company, or for other scheme of public improvement, is in the nature of a float, and covers lands not surveyed into sections, and the tracts of land upon which the grant is to operate can not be known until officially surveyed, as was the case in the *United States v. Montana Lumber Company*, 196 U. S. 573 (25 Sup. Ct. 367, 49 L. Ed. 604), the title remains in the United States until such survey has been made.

But such is not here the case. The lands had been fully surveyed, and the sections, townships, and ranges definitely located and numbered at least seven years before the grant under which all of the parties to this controversy claim. The grant is couched in words giving it immediate present efficiency, and when once enacted, no right or title to said section remained in the government, except the right to insist upon the fulfillment of the specified conditions, and to declare a forfeiture upon the failure thereof. The company having performed the conditions, it was in position to sell and give good title to the entire section, or to any part or parcel thereof. The original survey and plat, as we have seen, showed lots one and two extending to the water's edge, and disclosed no meander line independent of the shore line. The company, as proprietor of all the land, had the entire right to accept that survey as satisfactory, and sell and convey the property with ref-

2. BOUNDARIES:  
meandered  
lakes: excess  
land: title:  
estoppel.



erence thereto, and the grantee in such conveyance could successfully assert his title thereunder to all of the land indicated against all comers; nor could a later survey, made at the instance of mere strangers or intermeddlers, subvert the right so acquired. The railway company did sell and convey lots one and two with reference to the original survey and plat which then stood unquestioned. That survey, we repeat, showed the north line and south line of section twenty-seven both closing upon meander posts planted upon the shore of the lake, and the meander between them coinciding with the shore which is clearly marked as constituting the east boundary of lots one and two. It has been said by the Supreme Court of the United States that: "It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to another, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." *St. Clair v. Lovington*, 90 U. S. 63 (23 L. Ed. 59).

In discussing a similar question in *Railroad Co. v. Schurmeier*, *supra*, the same court, referring to the original plat, says: "In preparing the official plat from the field notes the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line as actually run on the land, is the boundary." If, therefore, the railway company confessedly owned all of the land in this half section, whether within or without the meander line, and saw fit to recognize this rule, and make sale and conveyance of lots one and two according to the only official survey then existing, no other person was authorized to object thereto, or dispute the effectiveness of such conveyance to carry title to all of the lands to the water's edge, and most

certainly the grantor is in no position to raise such a question. This conveyance of the land according to the original survey was an adoption of that survey for the purposes of such transaction. So far as the record in this case is concerned there is not the slightest evidence that that railway company supposed that it was reserving or retaining the title to any part of this land bordering upon the lake shore. There is nothing whatever to show that it was not fully aware of the alleged discrepancy between the original survey and the actual area, or that it was in any manner misled or deceived as to the true situation. There is nothing to show that from thence to this date it has ever asserted the existence of any such mistake, or sought its correction or a resurvey of the land. The attack upon the original survey and the demand for another were made by parties having no right, actual, apparent, or prospective, in the premises. So far as is shown by the evidence the attitude of the railway company with respect to that proceeding was purely receptive. It was making no claim for itself, but if these strangers were willing to shake the tree, it was not averse to appropriating any fruit which might fall in its lap. Its subsequent quitclaim to the appellee implies no assertion or affirmation of title in itself, nor does it necessarily indicate any attempt on its part to create or vest a title in appellee. Its only effect is to place the grantee in the shoes of the grantor, and if the latter had no title, legal or equitable, the deed conveys none. The stream can not rise higher than its source. Let us therefore inquire whether the railway company would be barred or estopped from making this claim of title against the appellants.

This inquiry we are constrained to answer in the affirmative upon at least two grounds: First, the legal effect of the conveyance by the railway company to the land company in 1884; and, second, the adverse possession of the premises in controversy by the appellants and their

grantors. The first of these propositions we have already treated at considerable length, and need only to add, by way of recapitulation: When this conveyance was made the original survey of the land with its plat and records had for nearly thirty years stood unchallenged. Both record and plat show lots one and two bounded upon the lake shore. This fact might perhaps have been of no binding significance as against a claim by the United States had the government not divested itself of title to the entire section, but as against the railway company which held title, legal and equitable, to all of the land, it is of decisive importance. The mistake, if one had been made, was as evident in 1884 as it was sixteen years later, when the call for a resurvey was made by a stranger. Without reservation or explanation said company, holding, as we have said, an indefeasible title to all of the land, saw fit to sell and convey these lots according to the original survey. For near twice the period of the statute of limitations it stood by and saw its successive grantees under said conveyance occupy all of the land up to the lake shore, claiming and using it as their own without protest or objection or any assertion or act of ownership upon its part, thus putting a practical construction upon its own deed, which is of the utmost significance. The most that can be said of this transaction is that the lots so conveyed may have contained more acres than the company supposed, and that the price received was less than it would have demanded had it been advised of the true acreage, though there is no testimony to this effect in the record, but such mistake, if any, does not affect the title conveyed.

It may be freely admitted that as between the government and the patentee or grantee of any portion of the public domain any mistake in the survey of the granted tract may be corrected in a proper proceeding for that purpose, if the effect thereof is to restore to the public do-

3. SAME:  
resurvey of  
patented land:  
jurisdiction.

main lands of which the government might otherwise be wrongfully deprived, and the genesis of the present controversy is doubtless in the mistaken notion that this rule is applicable as between the railway company and its grantees under the conveyance of 1884. But the rule thus conceded is not better established than is the other rule that where the government has parted with its title, and the controversy is wholly between persons asserting conflicting claims under grants or patents based upon the official survey, such survey is conclusive, even though as an engineering proposition it be grossly incorrect, and the land department has no more authority or jurisdiction to affect the rights of any party to such controversy, by directing a new survey or the issuance of a new patent, than it has to take cognizance of a boundary line dispute between adjacent farm owners who disagree as to the true location of a section line.

An instructive leading case upon this perhaps is *Cragin v. Powell*, 128 U. S. 691 (9 Sup. Ct. 203, 32 L. Ed. 566). There certain lands had been patented in

4. CONVEYANCES:  
reference to  
plat: effect.

part to individual purchasers, and in part to the State as swamp lands. A dispute arising between grantees of these titles, and action being brought in the said court to determine it, it was transferred to the federal court, which attempted to locate the lands by a new survey. On appeal it was sought to justify this judgment on the ground of the absence of any definite monument or date by which to ascertain the original line, except references in the original record to certain bayous and streams, and that the original survey was in general imperfect and incorrect. Overruling this proposition, and reversing the judgment of the trial court, it is said to be "a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all of its notes, lines, descriptions and landmarks becomes a part of the grant or

deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out on the face of the deed or grant itself." Applying this rule to the case at bar, and assuming that the deed from the railway company to the land company and each successive deed in that line of title had described the land as "northwest quarter, and lots one and two in section twenty-seven, township ninety-seven, range thirty-five, being the land described in the official report of the government survey as follows, to wit [setting out in full the surveyor's note and plat, showing both the north and south lines closing on the lake and the eastern boundary coincident with the shore line]"—can there be any reasonable doubt that if the grantors in such deed owned all of the land up to the shore, it would all pass by such deed to its grantee? There can be no reasonable doubt that such would be its effect, and if for any reason the grantor did not have title to any part of the land so conveyed, and it subsequently acquired title, it would insure to the grantee's benefit. That the original survey, even though incorrect, is conclusive between individual buyers and sellers who deal with it on the basis of such survey. See *Stoneroad v. Stoneroad*, 158 U. S. 240 (15 Sup. Ct. 822, 39 L. Ed. 966); *Russell v. Maxwell*, 158 U. S. 253 (15 Sup. Ct. 827, 39 L. Ed. 971); *Horne v. Smith*, 159 U. S. 40 (15 Sup. Ct. 988, 40 L. Ed. 68); *Ufford v. Wilkins*, 33 Iowa, 110; *Kraut v. Crawford*, 18 Iowa, 549.

True the location of lines and corners as established by the official survey, when the subject of dispute, may be determined as other questions of fact, but when any given, fixed monument or natural object named in the survey is found, it must be respected, even though its location be out of harmony with the recorded measurements.

"It is a universal rule that course and distance yield to natural and ascertained objects. A call

5. CONVEYANCES:  
description:  
natural ob-  
jects: course  
and distance.

for a natural object, as a river, a spring, or even a marked line, will control both course and distance." *St. Clair v. Lovington*, 90 U. S. 46 (23 L. Ed. 59). See, also, *Brown v. Milliman*, 119 Mich. 606 (78 N. W. 785). The last cited case is very much like the one before us in some of its essential features. There according to the government survey a meander post was set upon the shore of the lake. Later in attempting to trace this line the surveyor, following the minutes of course and distance as noted in the record of the original survey, located the meander corner seventeen chains west of the shore, but the court, recognizing the rule just quoted, held that the official survey was conclusive, and that the lake shore must be recognized as a monument fixing the boundary in that direction. To the same effect Judge Cooley says: "Where definite and permanent boundaries are given, the deed must be held to convey all land within those boundaries, notwithstanding the quantity is much greater than that mentioned." This is on the familiar principle that the incorrect portion of the description is to be rejected where that which remains is sufficient, and that definite and permanent monuments are to control distance and quantity. *Gilman v. Riopelle*, 18 Mich. 145. In the instant case the location of the first meander corner is designated as being at the intersection of the south line of the intersection of the lake, a fixed natural monument which can not be rejected in any controversy growing out of a conveyance of land according to the survey which it thus witnesses. Indeed, conceding, as the evidence tends to show, that the location of both the southwest and northwest corners of the section have been definitely located, and that the lake still extends along the eastern border substantially as it did in 1856, we have every monument called for by the original survey, and the only discrepancy between this showing and the one made by the later survey is in the

length of the south line of the fractional section, and the difference thus resulting in the superficial area of the land included within the lines thus traced. We regard it clear that the railway company can not be heard to say that its conveyance of said lands according to the original survey was ineffective to vest in its grantee title to all of the land within the boundaries thereby established. This result is in no manner inconsistent with the rule laid down in *Grant v. Hemphill*, 92 Iowa, 218, and *Schlosser v. Hemphill*, 118 Iowa, 452. In each of those cases it was affirmatively established that no lake or body of water existed at the time of the survey justifying the use of a meander line, and as the natural monument on which the section lines were supposed to close had no existence, it followed of necessity that the so-called meander line must be treated as a boundary. But in this case there was a lake with a permanent well-defined shore line, and the precedents referred to have no application. The case comes rather within the rule of *Ladd v. Osborne*, 79 Iowa, 93, and *Schlosser v. Cruickshank*, 96 Iowa, 414.

Having found for the defendants upon the decisive propositions hereinbefore discussed, we do not think it necessary to determine the issue of adverse possession. For the reasons we have stated the decree quieting title in the plaintiff is erroneous, and the same is reversed. The appellee, if he so elects, will have a decree in this court confirming his title, otherwise the cause will be remanded to the district court for decree in harmony with this opinion.—*Reversed*.

McCLAIN, J., dissenting.—The meander line of the first survey so far departed from the actual shore line as it was at the date of such survey that within section 27 more than one hundred acres of land were left between them unsurveyed, and not taken into account in computing the areas of the adjoining lots for purposes of sale; and

defendants, as owners of lots one and two in the fractional northeast quarter of that section, claim a tract of land between the meander line and the shore line larger than either of those lots. Now, while the case of *Schlosser v. Hemphill*, 118 Iowa, 452, may not be necessarily controlling because of the difference in the facts involved between that case and this, I should prefer to adopt, as applicable to this case, the language of that opinion, and say: "We are further inclined to believe that when the meander line deviates from the true shore, as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a resurvey." The railroad company did not purport to convey to defendants' grantor any other land than that described in its deed, and if the meander line constituted, as I think it unquestionably did, under a reasonable interpretation of the decision in the case referred to, a boundary line, then the grant by the railroad company should be limited to the lots described in accordance with the original survey. In my opinion it is wholly immaterial that the railroad company was already entitled, at the time its deed to defendants' grantor was made, to any unsurveyed portion of the northeast quarter of the section. It might grant that portion which was surveyed, or any part thereof, and retain its right to the balance. When the subsequent survey was made, it was found that the railroad company was entitled to further land in that quarter section, and in my opinion this land, between the meander line and the actual shore line, remained the property of the railroad company until granted to the plaintiff.

Under this state of facts I am unable to concur with the conclusion of the majority that the conveyance by the railroad company to the defendants' grantor of lots one and two carried with it the unsurveyed land between the



meander line and the shore line, a tract which, according to the second and correct survey is of the extent of more than forty-four acres, and I, therefore, dissent from the views expressed in the majority opinion.

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WILLIAM STONE, Appellee, v. ELIZA STONE, MINNIE BROWN and S. M. BROWN, ELNORA CLARK and C. L. CLARK, ETTA SUITER and P. M. SUITER, CLIFFORD STONE and ———— STONE, his wife, and BARTON STONE and IDA STONE, Appellants.

**Deeds: RESERVATION: EXCEPTION: DISTINCTION.** A reservation in a  
1 deed of conveyance is the creation of a new right issuing out of the thing granted in favor of the grantor only, which did not exist as an independent right before the grant, and in the absence of words of inheritance continues only for the life of the grantor; while an exception is a clause withdrawing from the conveyance some part of the thing granted which otherwise would have passed to the grantee.

**Same.** A deed conveying in trust the entire estate in lands, ex-  
2 cept certain designated timber, which was reserved for the use and benefit of a third person, is held to be an exception of the timber from the grant rather than a reservation of part of the estate granted, and that the entire estate in the land passed to the trustee.

*Appeal from Scott District Court.*—HON. J. W. BOLLINGER, Judge.

SATURDAY, FEBRUARY 20, 1909.

SUIT in equity to establish and quiet plaintiff's title to certain real estate in Scott County, Iowa. The trial court granted the relief prayed in plaintiff's petition, and defendants appeal.—*Affirmed.*

W. M. Chamberlin and Walter H. Peterson, for appellants.

*J. A. Hanley*, for appellee.

DEEMER, J.—Both plaintiff and defendants claim title under a deed made by Henry Stone, Sr., and his wife, Betsey, to Ruth Stone, on or about April 9, 1870, the material parts of which read as follows:

Witnesseth: That whereas the said Henry Stone, Sr., is desirous to make provision for his daughter-in-law, the aforesaid Ruth Stone, and for her children hereinafter to be named, against future contingencies and hers and their support, and whereas the aforesaid Henry Stone, Sr., is desirous that his said daughter-in-law and her children should enjoy the proceeds, rents, issues, and income of the real estate hereinafter more particularly described for the full term of her natural life, free from the control, liabilities, or interferences of any husband that she may hereafter have: Now, therefore, this indenture, witnesseth: That the said Henry Stone, Sr., in consideration of the sum of one dollar to him in hand paid by the said second party, the receipt whereof is hereby acknowledged, has bargained and sold, and does by these presents grant, bargain, sell, convey and confirm unto the said second party, the following described real estate lying and being situated in the county of Scott, and State of Iowa, to wit: The west half ( $\frac{1}{2}$ ) of the northwest quarter of section No. five (5), township No. seventy-eight (78) North, of range five (5) East, of the 5th P. M., excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section, the land upon which said timber is situated more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as the Condid Creek, thence in an easterly direction following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge, thence in a southerly direction on and along said Slough Road to the south line of said premises, thence west to the place of beginning, supposed to contain fifteen (15) acres. Said timber reserve is made for the express use, benefit, and behoof of Henry Stone, Jr., son of Henry Stone, Sr., also

the east half ( $\frac{1}{2}$ ) of the west half ( $\frac{1}{2}$ ) of the southwest quarter of section No. five (5), in township No. seventy-eight (78) North, of range five (5) East, of the 5th P. M., containing forty acres (40), more or less. The intention being to convey hereby absolute title in fee simple to said real estate, to have and to hold the premises herein described in trust for the uses and purposes hereinafter specified. First. To use for the maintenance of herself and for the maintenance, education and support of her minor children the aforescribed trust for the full term of her natural life, she to pay from the proceeds, products, and use of said trust all taxes that may hereafter be justly assessed against said premises. Second. To leave the premises at her death in as good condition as reasonable use thereof will permit to her two sons named William Stone and Henry Stone. Third. The said Henry Stone, Sr., and Betsy Stone, his wife, hereby declare that upon the decease of the aforesaid Ruth Stone, the aforesaid trust shall cease and determine, and the foregoing described premises shall belong in fee simple to William Stone and Henry Stone, sons of the said Ruth Stone, upon the express condition that the aforesaid William Stone and Henry Stone pay or cause to be paid to their three sisters the following sums, to wit: To their sister Harriet the sum of one hundred dollars (\$100), to their sister Mary the sum of one hundred dollars (\$100), to their sister Ida the sum of one hundred dollars (\$100), said sums to be paid at the time of their taking possession of said premises, and the said party of the second part doth hereby signify her acceptance of this trust, and doth hereby covenant and agree to and with the said parties of the first part faithfully to discharge and execute the same to the true intent and meaning of these presents. In witness whereof, we have hereunto set our hands and seals, this 10th day of May, A. D. 1870.

Thereafter, and in the year 1901, Harriet Dickinson and her husband and Mary Shanor and her husband, Ida Waterbury and her husband, and H. H. Stone and his wife conveyed their respective interests in the lands described in the initial deed quoted to plaintiff, William Stone. The three main grantors in these several deeds

are brother and sisters of the plaintiff. Henry Stone, Sr., the grantor in the first deed quoted, was the father of Henry Stone, Jr., and the grandfather of plaintiff. Plaintiff's mother, Ruth Stone, was the widow of Miron Stone, who was a son of Henry Stone, Sr. Ruth Stone died in the year 1901, and Henry Stone, who was the husband of the defendant Eliza Stone and the father of the other defendants, died prior to the time of the death of Ruth. Ruth Stone held a life estate in the property in controversy, and, with plaintiff, has been in the possession of the property since the time of making the original deed in May, 1870. Plaintiff has paid each of his three sisters the \$100 provided for them in the deed hitherto set out, and has received the deeds mentioned, and he, plaintiff, has also purchased an undivided one-half of his brother Henry's (or H. H. S.'s) interest. Unquestionably, then, plaintiff owns the fee title in said premises, unless it be found that defendants have some interest in virtue of the exception or reservation clause of the original deed, which reads in this wise:

Excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section; the land upon which said timber is situated, more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as Condid Creek; thence in an easterly direction, following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge; thence in a southerly direction on and along said slough road to the south line of said premises; thence west to the place of beginning, supposed to contain 15 acres. Said timber reserve is made for the express use and benefit and behoof of Henry Stone, Jr., son of Henry Stone, Sr.

Upon this defendants base their claim to one hundred and twenty acres of the land. The argument is that the

would be quite destroyed. See, also, *Johnson v. Harder*, 45 Iowa, 677, for a case bearing some analogy.

In this fifth instruction the court charged the jury that the plaintiff was entitled to the benefit of his contract, and that therefore the evidence referred to should be considered only for the limited purpose therein stated. This was an assumption that the evidence in question, unless limited in its purpose as therein stated, tended to deprive the plaintiff of the benefit of the invoice prices bargained for by him for his merchandise. But it must be noted that we are dealing here with a rule of evidence, and not with a rule of measure of damages. There is nothing in this rule of evidence which deprives the plaintiff of any benefit of his contract. The benefit of his contract is secured to the plaintiff by the rule of measure of damage. The rule of measure of damage applicable in such a case fully protects the plaintiff in this respect. It has been framed by the courts with that very end in view. Plaintiff may prove, if he can, that the property purchased by him, if as represented, would have been worth even more than the agreed purchase price, and he may prove such enlarged value by the testimony of witnesses, regardless of the price paid. The rule that defendant should be permitted to rebut the evidence of plaintiff as to the true consideration paid in no sense militates against plaintiff's right to show the real value of the property as it would have been if as represented, and to claim the benefit of his contract in this manner. The idea that the plaintiff may have the benefit of this rule of measure of damage, and in addition to that may have some further supposed benefit from the sale of his goods at invoice prices, is not tenable. This idea is a first impression which often obtains in the mind of bench and bar. But its fallacy can readily be made to appear by putting side by side the two following hypothetical statements: (1) Suppose the land be as good as represented. Plaintiff is

then whole. If whole, he has the full benefit of his contract, including the invoice prices bargained for. And this is so even though the value of the land be less or more than \$65 per acre. (2) Suppose the land be not as good as represented, and that it be worth \$7,000 less than it would have been if as represented. The plaintiff then lacks \$7,000 of being whole. The rule of measure of damage requires the defendant to pay him that sum. That being done, the plaintiff is whole again, as whole as in the first position stated. If whole, we repeat, he has the full benefit of his contract, including the invoice prices bargained for. And this is so even though the value of the land, plus \$7,000, be less or more than \$65 per acre.

Plaintiff is party to only one contract, although it be represented by two contemporaneous instruments; is entitled to one damage, indivisible; and to only one rule for the measure of it. So that the rule of measure of damage is quite adequate to protect the plaintiff in the full benefit of his contract, and the rule of evidence under consideration is in no sense inconsistent with it, nor with plaintiff's full rights in that respect. It follows, therefore, that in this action for damages for false representations in the sale of property, where the consideration was in part an exchange of other property, and where the direct evidence is in conflict as to whether false representations were made, and where the plaintiff has pleaded and put in evidence the alleged consideration paid by him, the defendant is entitled to rebut such evidence by showing the actual value of the property consideration exchanged by plaintiff, and such evidence of consideration, on behalf of defendant, should have been permitted to run with the evidence of consideration on the part of the plaintiff, to be considered by the jury in connection therewith and for the same purposes. And it may be added generally that either party is entitled to show the value of the property

consideration paid or received by him as a circumstance bearing upon the probability, not only whether false representations were relied upon, but also whether the false representations were made. Under this rule the fifth instruction placed too narrow a limitation upon the purpose for which such evidence might be considered.

III. Referring again to the case of *Likes v. Baer*, cited above, it may perhaps be proper to say that, as it was first decided and reported in 8 Iowa, 368, the opinion of the court was adverse to this rule of evidence. A rehearing being granted, the court reconsidered its former opinion on that question, and laid down the rule which we are now following. The second opinion is reported in 10 Iowa, 89. The rule laid down in the second opinion has been followed in other jurisdictions. See *Aldrich v. Scribner*, 146 Mich. 609 (109 N. W. 1122). The case has not often been cited in our own subsequent reports on that question, nor has the case of *High v. Kistner*. Neither of these cases found a place in the careful briefs of counsel in this case, and the question has been submitted to us without any other Iowa citation directly in point. We have therefore discussed the question more elaborately than we might otherwise have deemed useful. A reference should be made here to the case of *Hibbets v. Threlkeld*, 137 Iowa, 164. This question was there considered from the reverse side; that is to say, the plaintiff was the appellant, and complained of an instruction similar in its effect to the fifth instruction in the case at bar. Plaintiff took the ground in that case that the evidence in question was not admissible for any purpose. The point was overruled by this court, and the instruction sustained. But the right of the defendant to complain of the instruction as too narrow was neither involved nor considered in that case. Because of the error in the fifth instruction this case must be reversed and remanded for a new trial.

Other alleged errors are argued, but the questions involved are of such a nature that they are not likely to arise on another trial.—*Reversed and remanded.*

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B. F. LOOSE, Appellant, v. JOHN COOPER, Appellee.

**Dismissal of action.** Where the court dismisses a case on its own  
1 motion it should make a record of the ground of its action, but  
although failing to do so a presumption obtains in favor of  
the ruling, and a reversal will not be ordered unless upon the  
whole case there is no ground to support it.

**Same: WANT OF PROSECUTION: REINSTATEMENT.** The court has power  
2 to dismiss a cause for want of prosecution independent of any  
statute; and where a case remained on the docket for five years  
after issue was joined and plaintiff and his attorney were in  
the court room but made no objection to the order of dis-  
missal the court was justified in refusing a motion for rein-  
statement.

*Appeal from Polk District Court.*—HON. W. H.  
McHENRY, Judge.

SATURDAY, NOVEMBER 21, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

*Affirmed.*

H. H. Crow, for appellant.

No appearance for appellee.

EVANS, J.—On November 23, 1901, plaintiff and defendant entered into a written contract whereby the defend-  
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ant agreed to sell to the plaintiff certain stock in the Fidelity Insurance Company for an agreed price of \$11,250, to be paid, with 5 percent interest, at the rate of \$125 per month. Other provisions were contained in the contract which need not be noticed here. The contract provided for liquidated damages in the sum of \$21,750. The plaintiff has brought this action for such liquidated damages. The defendant has filed a counterclaim for \$20,550 as damages for breach of contract. The plaintiff filed his petition on April 22, 1902. The defendant filed his answer and counterclaim on May 12, 1902. The plaintiff filed his reply denying the counterclaim on May 16, 1902. No further proceedings of any kind were ever had in the case until June 29, 1907, and on that date the district court on its own motion dismissed the case at plaintiff's cost. Afterwards, on September 9, 1907, the plaintiff filed a motion to reinstate the case, and on September 18, 1907, this motion was by the court overruled. The plaintiff appeals.

Plaintiff's contention is that the court was not warranted in dismissing this case on its own motion, there being no request for a dismissal from either party. The ground upon which the court entered the dismissal does not appear in the record.

1. DISMISSAL  
OF ACTIONS.

We would be better satisfied with this record if such ground did appear. When a court acts in such a case upon its own motion, it is highly desirable that it should state the ground upon which it acts. The failure to do so gives an appearance of arbitrary action, and is a practice not to be commended. Nevertheless, we are required to indulge in a presumption in favor of the ruling of the trial court. We are not justified in reversing it unless from an examination of the whole record we fail to find any ground to support it.

It is quite apparent upon the face of this record that the court would have been justified in dismissing this case

for want of prosecution. The power is inherent in the court, quite independent of the statute. The issues were made up and the last pleading filed on May 16, 1902. For more than five years thereafter the case lay in a comatose condition. The amounts involved in both petition and counterclaim were sufficiently large to warrant some show of activity on the part of both parties. Apparently no effort was made by either party to bring the case to trial. Plaintiff states in his argument in this court that he and his attorney were present at the time of the dismissal. But it does not appear from such statement nor from the record that he made any objection at that time to the action of the court, nor took any exception thereto. Afterwards he filed a motion to reinstate, but it does not appear that he served any notice of such motion upon the defendant.

a. SAME: want of prosecution: reinstatement.

Appellant cites the case of *Hensley v. Davidson Bros.*, 135 Iowa, 106. That case and the one at bar are not at all parallel. The power of the court to set aside a verdict on its own motion was conceded in that case. It was held, however, that the only possible ground of the court's action in that case was the insufficiency of the evidence. Inasmuch as this court had in a former appeal held that the evidence was sufficient to sustain a verdict for the plaintiff, it was held that the lower court was not justified in ignoring the decision of this court, and its action was therefore reversed. No such question is involved in the case at bar. The court below was acting within the limits of a broad discretion which it was required to exercise fairly. We can not say that, under the circumstances appearing in this case, the court abused that discretion.

The contract sued on in this case seems to have been drawn with such skill as to afford to each party a substantial cause of action against the other. The parties were prompt in going into court and in making up the issues. If in fact the defendant had notice of plaintiff's

motion to reinstate, he made no resistance to it. He appears to have been served with notice of appeal to this court, but he makes no appearance. The circumstances surrounding the case are such as to fairly warrant a belief that the issues presented by the pleadings were fictitious and perhaps collusive, and that the records of the court were being used for ulterior purposes.—*Affirmed.*

141	380
144	174

IN RE JOHNSON DRAINAGE DISTRICT, No. 9, CHICAGO AND NORTHWESTERN RAILWAY COMPANY and TOLEDO & NORTHWESTERN RAILROAD COMPANY, Appellants, v. HAMILTON COUNTY, IOWA, BOARD OF SUPERVISORS OF HAMILTON COUNTY, IOWA, ET AL.

**Drainage: ASSESSMENT OF BENEFITS: RAILWAY LANDS: NOTICE: APPEAL: STATUTES: CONSTITUTIONALITY.** The Act of the 30th General Assembly relating to the assessment of benefits for drainage purposes provides a separate and distinct method for the assessment of railroad lands from that provided for agricultural lands, and does not contemplate that railroad lands shall be classified in tracts of forty acres or less; and express provision is therein made for notice to railway companies of the assessment and for the right of appeal, so that the act is not unconstitutional for failure to so provide in either respect.

**Drainage: ASSESSMENT OF RAILWAY LANDS: BENEFITS: PRESUMPTION.**  
2 An assessment for drainage purposes can only be made for actual benefits, but a presumption obtains in favor of an assessment and the burden is on the party attacking it as excessive and disproportionate to establish the claim; and where the evidence fairly tends to show that the assessment of railroad lands is not in substantial excess or out of proportion to that of other lands in that district, it will not be disturbed.

*Appeal from Hamilton District Court.*—HON. J. R. WHITAKER, Judge.

MONDAY, NOVEMBER 23, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE appellants appealed from an assessment of benefits to the district court where their appeal was dismissed, and, from that judgment, they appeal to this court.—*Affirmed.*

*J. L. Kamrar, George E. Hise, James C. Davis, and A. A. McLaughlin, for appellants.*

*D. C. Chase and J. M. Blake, for appellees.*

SHERWIN, J.—The commissioners appointed to classify the lands and property in the drainage district, and assess the benefits thereto, did not classify the railroad right of way as farm lands were classified, nor did they make any classification thereof in fragments or subdivisions. The railroad property in the district consisted of about sixty-seven and a half acres in twenty-one different forties. The benefits were assessed in a lump sum on the entire holding, and the appellants contend that such an assessment is wholly unauthorized by chapter 68, Acts 30th General Assembly that the assessment of \$800 was greatly in excess of the benefits, and greatly in excess of, and out of proportion to, the assessments on farm lands; and that said assessment was not equalized with the assessments on other lands in the district.

1. DRAINAGE:  
assessment of  
benefits: rail-  
way lands:  
notice: appeal:  
statutes: con-  
stitutionality.

The appellants rely upon the following propositions:

(1) The commissioners to assess benefits were required to classify the railroad lands, and give each portion thereof a percentage of benefits, based upon the percentage of one hundred, as a condition to making an assessment, and as a basis therefor.

(2) If the railroad property is not land, the drainage law is void, because only in such event is notice re-

quired to be given to a railway company, and only in such event is the right of appeal given to it.

(3) It was the duty of the commissioners to assess benefits to equalize the assessment against the railroad property with the assessments on other lands.

(4) Having failed to classify the railroad lands and equalize the assessment thereon with the assessments on other lands, and having failed to comply with the statutes in the time and manner of performing their duties, on the part of the commissioners, the assessment is void.

(5) The report of the commissioners failing to show that the railroad lands had been classified, and the assessment equalized, the board of supervisors did not acquire jurisdiction to make an assessment.

(6) Appellants' property can be assessed only for the actual benefits accruing to it from the improvement, because of the drainage, and in the proportion that other property is assessed.

(7) The commissioners having failed to comply with the law in making the pretended assessment, and no classification or equalization having been made, there is no presumption that the amount assessed is a correct estimate of benefits to the railroad property from the improvement, nor is the amount *prima facie* in proportion to the assessments on other lands.

(8) If the assessment is not void, then it is grossly excessive and should be reduced.

We shall consider these propositions in the order of their presentation to us.

Section 12, chapter 68, Acts 30th General Assembly, provides for the appointment of commissioners to assess benefits conferred by the improvement. It defines their duties in the following language:

They shall . . . personally inspect and classify all the lands benefited by the location and construction of such . . . drainage district . . . in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed im-

provement; . . . and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof.

The appellants urge that the railroad property within the drainage district is either land within the meaning of the statute, or else the statute, so far as railroads are concerned, is unconstitutional, "in that no provision is made for giving notice to any except landowners, incumbancers, and occupiers of land, and no appeal is provided for any except owners of land." That railroad property within the district is not land within the meaning of the statute, and is not to be classified as lands are, is made clear by the statute itself. For the purpose of ascertaining and assessing the benefits conferred by the improvement, the statute makes three classes or divisions of property. Section 12 provides for one class which includes lands used for the usual and ordinary purposes. Section 19, after making provision for the construction of the drainage ditch across the right of way of a railroad company, provides as follows:

All other proceedings in relation to railroads shall be the same as provided for individual property owners within the district, except that the cost of constructing the improvement across its right of way shall be considered as an element of its damages by the appraisers thereof; and the commissioners to assess benefits shall fix and determine the actual benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return. Such special assessment shall be a debt due personally from the railroad com-

pany, and, unless the same is paid by the railroad company as a special assessment, it may be collected in the name of the county in any court having jurisdiction.

Section 20 also makes a separate class of highways, and provides that:

Whenever any highway within the levee or drainage district will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of the benefit to such highway.

A further provision is therein made for notice to the township in which the highway is located and for a hearing and determination of the amount to be apportioned to the road district on account of such benefit. It seems to us that there can be no serious question as to this legislative classification. Neither railroad property nor highways are used as lands are ordinarily used, and hence the benefits to be derived by such property from the improvement are of an entirely different character from those conferred upon agricultural lands. This was manifestly the thought of the Legislature, for in the sections relating to railroads and highways the commissioners are given express directions as to what shall be done by them. In section 19 they are directed to "fix and determine the actual benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return." If the railroad property was to be classified and assessed as land under the provisions of section 12, the provision of section 19 was entirely unnecessary and useless. Why require an independent assessment and an additional report if it was all covered by the provisions of section 12? No logical or satisfactory answer can in our judgment be made to the question. Moreover, special provision is made for the col-

lection of the assessment, and the assessment is made the personal debt of the railroad company. They are provisions which do not apply to assessments made under section 12, and which in our judgment strengthen the conclusion that the Legislature intended to make railroad assessments a class entirely distinct and separate from that of the ordinary landowner. And, if this be true, we think it follows that there was no intention that railroad property should be classified in tracts of 40 acres or less according to "the legal or recognized sub-divisions in a graduate scale of benefits, to be numbered according to the benefit to be received by the improvement."

The contention that if the railroad property is not land within the meaning of section 12 and to be assessed as such, the law is unconstitutional and void because only in such event is notice required to be given to a railroad company, is clearly without merit. Section 19, as we have heretofore shown, expressly provides that "all other proceedings in relation to railroads shall be the same as provided for individual property owners within the district." And such requirement clearly and unmistakably provides for the notice called for by sections 3 and 12. An appeal is given the railroad company by section 14 of the act.

As we understand the appellants' argument, their third, fourth and fifth propositions are, in effect, based on their contention that the railroad property should have been assessed and equalized as lands under the provisions of section 12, and what we have already said on that subject may be applied to these propositions without further discussion thereof.

In support of their sixth and eighth propositions, the appellants urged that their property can be assessed only for the actual benefits accruing thereto from the improvement, because of the drainage, and in the proportion that other property is assessed, and that the assessment is

2. DRAINAGE:  
assessment of  
railway lands:  
benefits:  
presumption.



grossly excessive. These two contentions may be disposed of together, for they involve questions of fact only; it being well settled that an assessment can be made for actual benefits only. *Zinser v. Board of Supervisors*, 137 Iowa, 660.

On the questions of fact there was a diversity of opinion. If some of the appellants' witnesses were correct in their opinions, the improvement might be said to be a damage to the appellants' road rather than a benefit. But such estimates are not decisive of the question, and we think the evidence as a whole fairly sustains the trial court's finding that the assessment was not in substantial excess of the benefits to be derived therefrom in the way of the betterment of the roadbed and track and not out of proportion to the assessments on the lands within the district. The presumption is in favor of the assessment established by the board, and the burden is on the appellants to overcome the same. *Temple v. Hamilton County*, 134 Iowa, 706. On the whole case we conclude that the judgment should be *affirmed*.

141	386
141	348
141	487

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J. H. MERRILL, J. W. GARNER AND CALVIN MANNING,  
Appellees, v. J. B. SAX, Appellant.

**Principal and agent:** SECRET PROFIT: ACCOUNTING. An agent or confidential representative can not secretly profit by the transaction but is required to account to his principal for all such profits, even though received in a transaction relative to the subject matter in excess of his authority, and this duty is not relieved by accounting for the full price at which he was authorized to make the sale of the property; so that where defendant, an owner with others of certain corporate stock, was appointed by them to complete a transfer of all the stock, including his own at a price agreed upon, each to pay his proportionate share of the expense, demanded and received of the purchaser as a condition precedent to delivery a large sum in addition to the agreed purchase price, he could not secretly

retain the same as a commission but must account to his associates therefor.

**Same: GRATUITOUS AGENCY.** The fact that an agent acts gratuitously  
2 does not relieve him from the obligation to account to his principal for all profits made out of the subject matter of his agency; but where one of several owners of corporate stock is appointed by them to close a sale of the whole, less than which the purchaser would not buy, at the expense of all in proportion to their interests, the agency is not gratuitous.

**Same: COMPENSATION OF AGENT.** The express agreement by which  
3 one of several owners of corporate stock is to have his expenses in closing a sale of their combined holdings, excludes the idea that he is to be compensated for his services; but even if he was entitled to compensation in addition to his expenses, that fact would not relieve him from the obligation to account to them for any sum received from the purchaser in addition to the agreed purchase price.

**Same: FRAUD.** Although an agent for the sale of corporate stock  
4 demanded from the purchaser a sum in addition to the agreed purchase price, as a condition precedent to its delivery, and the purchaser knowing his rights yielded to the demand, it did not constitute a legal fraud.

**Principal and agent: ACCOUNTING.** Where one of several owners  
5 of corporate stock was authorized to complete a sale of all their interests and they united in paying his expenses incident thereto, a sum demanded and received by him from the buyer in excess of the agreed purchase price of the stock was in effect the price of its delivery, and should be accounted for to the several owners.

*Appeal from Wapello District Court.*—HON. C. W. VERMILLION, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THE opinion states the case.—*Affirmed.*

*Smith & Lewis and Jaques & Jaques*, for appellant.

*Tisdale & Heindel and Work & Work*, for appellees.

WEAVER, J.—The plaintiffs' case, as stated in their petition, is to the following effect: On December 19, 1905, the Ottumwa Traction & Light Company was a corporation owning certain public service franchises in said city. Certain persons residing in said city, and spoken of in the record as the "Ottumwa crowd," or "Ottumwa parties," including plaintiffs and defendant, owned in varying proportions a majority of the shares of preferred and common stock which had been issued by said corporation and were then outstanding. The remainder of the stock issued was owned by parties residing in St. Louis, Omaha and places other than Ottumwa. These parties residing in Ottumwa were in the habit of consulting together and acting in harmony with reference to the protection and promotion of their several interests in said corporation, of which the plaintiff Merrill was president, and the defendant Sax secretary. All these parties desired to dispose of their stock if a buyer at a suitable price could be found. Late in October, 1905, a representative of H. M. Byllesby & Co., of Chicago, appeared at Ottumwa and made some inquiry or investigation into the affairs of the corporation with a view to the purchase of the stock. While there, he made some suggestion in a tentative way as to the price which his principal would be willing to pay for said stock provided the entire issue could be obtained, and the Ottumwa parties, or those holding the bulk of the stock, including plaintiffs and defendant, met in consultation upon the subject. At that interview it seemed best that negotiations on behalf of said parties be conducted by some representative or representatives acting in the interest of all, rather than by each acting separately, and it was agreed to place the matter in the hands of the defendant, who was to be assisted by Maj. Mahon, one of their number, if assistance was required. Thereupon the de-

fendant and Mahon began negotiation, upon the one hand, to obtain a definite proposition from the proposed purchaser, and, upon the other, to secure the consent or cooperation of the other stockholders residing outside of Ottumwa. On November 7, 1905, Sax entered into a written contract with Byllesby & Co., by which said corporation agreed to pay to Sax the sum of \$384,000 for the entire issue of preferred and common stock in the traction and light company; the price being reckoned at the rate of ninety cents on the dollar for the preferred stock and sixty cents on the dollar for the common stock. By the closing paragraph in said contract Mr. Sax states that he will use his best endeavors to make the delivery according to the contract, and that the same should include his own holdings for over \$95,000 par value of the preferred stock and over \$125,000 par value of the common stock. These last sums mentioned constitute substantially the sum of preferred stock and common stock then held by said Sax, Mahon, and the plaintiffs herein. Sax and Mahon visited and interviewed the stockholders residing in St. Louis and Omaha, and while these stockholders declined to consummate any deal with them or through them, they opened up negotiations with Byllesby & Co. direct and perfected a sale of their shares. To enable Sax to carry out his agreement, the plaintiffs and Mahon entered into a writing, whereby they agreed to deliver to him their respective holdings of the stock at the prices above named. Said writing embodied also the following stipulation: "We agree to deliver these shares of stock to you or any one you may designate upon the terms of the above-mentioned amount, less cost for expense incurred in negotiating said sale, which is not to exceed two percent of the sale price." On December 7, 1905, the negotiations had been so far perfected that defendant, having secured the assignment of the stock of the Ottumwa parties and having the certificates in his possession or under his control

ready for delivery to the purchaser, went to Byllesby & Co. and insisted, as a condition of the delivery of the stock so held by him, that he be paid a sum equivalent to three percent of the entire purchase price of all of the stock. This demand was for a time resisted, and, after an unsuccessful attempt to satisfy defendant by the offer of \$3,840, a compromise was reached, by which he was paid the sum of \$7,680, and the stock was delivered and the deal closed. On returning to Ottumwa, defendant reported the sale to the parties in interest, and, after deducting the expenses which he and Maj. Mahon had incurred in carrying the deal to a successful conclusion, accounted to the several parties in interest for their respective proportions of the stock sold at the contract price above named. In making said report he concealed or withheld the fact of the receipt of said sum of \$7,680, and has never accounted therefor, though it appears that he at some time made it known to Mahon, to whom he paid \$2,500. It is the claim of plaintiffs that the defendant in negotiating and completing the sale was not acting for himself only, but as agent of the other Ottumwa stockholders, that his receipt of said sum of \$7,680 and the concealment of said transaction from them was a breach of his duty as their representative, and they demand that he make an accounting for the money so obtained. The defendant denies that in conducting said negotiations or in making the said sale he was acting in any manner as agent of the plaintiffs. He pleads also many facts which are largely in the nature of matters of evidence the substance of which is that he undertook the contract with Byllesby & Co. on his own responsibility and that he is under no obligation to account to plaintiffs for the additional sum obtained by him from said purchasers. On hearing the evidence the trial court found for the plaintiffs and entered a decree requiring the defendant to account for the money so received to each of said plaintiffs

in the proportion which their holding of stock bore to the entire amount held by said Ottumwa parties. The defendant appeals.

The record of the testimony is entirely too voluminous to permit its rehearsal in this opinion, even in condensed form. We have read it with the care which its importance

1. PRINCIPAL  
AND AGENT:  
secret profits:  
accounting.

demands, and find that it fully sustains the conclusion of the trial court upon all disputed questions of fact. In addition to the positive and direct testimony on part of the plaintiffs, it is impossible to reconcile the admitted conduct of appellant upon any other theory than that he undertook to and did act in a representative capacity for the plaintiffs and his other fellow stockholders at Ottumwa. Such being the conclusion, we have to inquire whether, conceding the existence of that relation, he is liable to account to those whom he represented for the money exacted by him from Byllesby & Co. in excess of the contract price of the stock. Counsel for appellant direct our attention to a line of authorities in support of the proposition that a person may act as agent for both seller and buyer where both parties are aware of his conduct in that respect and consent thereto, and that the agent of the seller may rightfully treat or deal with the buyer with respect to the subject-matter of the agency so long as such conduct or dealing does not conflict with the agent's duty to his principal. The soundness of the doctrine thus stated need not be questioned, but its application to the case at bar can not be conceded. All of the parties, appellees and appellant, were acting jointly in an endeavor to get the best possible price for their stock, and the execution of that purpose was confided to appellant. It was clearly his duty to give to his associates the benefit of his best service in the discharge of the trust confided to him, and to account for the entire amount paid to him by the purchaser. To say that the money in question was not paid to him in consideration of

the sale of this stock, but was in the nature of a commission or payment for services otherwise rendered to Byllesby & Co., is to ignore practically all of the material facts in the case.

In the first place, appellant performed no service as agent for Byllesby & Co. He did not represent that concern in any respect. He did undertake to sell to them an amount of stock substantially equivalent to the entire holdings of the Ottumwa parties for whom he was acting, and to use his best endeavors to procure the sale to them of all the remainder of the stock at a given price. In other words, as between him and Byllesby & Co., it was an ordinary contract of purchase and sale into which not the slightest element or appearance of agency entered. On December 7, 1905, the deal had developed to a point where appellant felt himself in position to demand terms from Byllesby & Co. He had in his possession the stock which had been held by himself, Mahon, and the plaintiffs, and without which the scheme of the purchaser to take in the entire issue and reorganize the corporation could not be effected. Availing himself of this advantage, he impressed upon Byllesby & Co. the belief that the sale would not be carried out unless they paid him a large sum in addition to the contract price, and, yielding to his demand, the money in controversy was paid over to him. To call this exaction a commission is to dress the transaction in a garb it is not entitled to wear. The money so received by him was received for doing the very thing which he had agreed to do and which in good faith to those who intrusted him with their stock he was bound to do, and it would be a most dangerous as well as inequitable rule to permit him to retain the sum so realized and avoid accounting therefor. If A. places his horse in the hands of B., with authority to negotiate a sale to C. on the best obtainable terms, and B., having obtained an offer which he is directed to accept, goes to C., and, while having the horse

ready for delivery, refuses to make it until C. makes him a large additional payment, which he does not report or account for, we think his defense to an action for an accounting will receive little favor in a court of justice, even though he calls the sum thus received a "commission." Let us then bring the illustration a little closer home, and suppose that four different persons each own a horse which he desires to sell, and C. is willing to buy providing he can purchase all of them. To facilitate the deal, the four persons agree that one of their number, A., shall conduct the negotiations; each to pay his proportionate share of the expense which may be thus incurred. Armed with this authority, A. agrees with C. to sell him the four horses for \$100 each, and this, being reported to the several owners, is agreed to, and the horses placed in A.'s hands for the consummation of the deal. Thereupon he goes to C. and refuses to make delivery of the property until he has received an additional percentage upon the agreed price, which he chooses to call a "commission." If this demand be submitted to, and he places the money so obtained in his own pocket, concealing the transaction from those associated in interest with him, does A. occupy any more favorable position than he did in the first illustration above used? We think not. If there be any difference, his relation to his associates in the latter deal is of a closer and more confidential nature than was his relation to his principal in the former. They were engaged in a common enterprise, working together to a common end, the disposition of the property of each and all at the best obtainable price, and each was entitled to open-handed frankness and fairness of dealing at the hands of the others, and especially at the hands of the man selected to represent them in the actual negotiations and consummation of the sale. *Getty v. Devlin*, 54 N. Y. 403. To permit an agent or confidential representative to secretly profit by his manipulation of the subject-matter of his agency is to offer a premium



to fraud and breach of faith. The law therefore holds him bound to account to his principal for all such profits, even though they were received by transactions in excess of the authority given him, and this law is none the less imperative because he accounts for the full price for which he was authorized to sell. Story's Agency (8th Ed.) sections 207-214; 1 Clark & Skyles, Agency, sections 406, 417; *Salsbury v. Ware*, 183 Ill. 505 (56 N. E. 149); *Holmes v. Cathcart*, 88 Minn. 213 (92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513).

Appellant makes the further point that at most he was acting as a gratuitous agent, and is therefore not to be held to the same strict liability for an accounting; but

2. SAME:  
gratuitous  
agency. he was not in any sense of the term acting gratuitously. These persons, as we have seen, were engaged in a common enterprise to dispose of their holdings of stock. As the purchaser wished all or none, the appellant and appellees each had a direct interest in bringing about the sale of the stock of his associates, and their agreement to share with appellant the expense incurred was also a valuable consideration, if any was needed, sufficient to support his express or implied agreement to represent their interests. Moreover, the agent who acts gratuitously is not in any manner relieved from the ordinary obligation upon agents to act in good faith with their principals and to account to them for all profits made out of the subject-matter of their agency. *Salsbury v. Ware*, 183 Ill. 505 (56 N. E. 149).

Finally, it is said in appellant's behalf that the claim or appellees is inequitable because they do not offer to pay him for "his skill and knowledge devoted to carrying through the enterprise and after reaping the full benefits of a satisfactory sale come into court and coldly demand a portion of that which he receives from another as his personal earnings." Counsel overlook the very obvious and very pertinent truth

3. SAME:  
compensation  
of agent.

that it was appellant's skill and knowledge and personal service which the law bound him to render to those for whom he undertook to act. The express stipulation by which he was to be reimbursed for expenses incurred excludes the idea of an implied agreement to pay him any more, and, even if he were entitled to payment of a reasonable compensation by appellees in addition to his expenses, that fact would be no justification for his act in secretly obtaining a personal profit out of the matter which he was conducting, or professing to conduct, for their mutual advantage and interest.

Nor can his action in this respect be regarded as a fraud or wrong upon Byllesby & Co. for which he is accountable alone to that corporation. Byllesby & Co. knew

4. SAME: fraud. that under their contract with appellant they were entitled to the stock held or controlled by him on the terms there specified, and if the purchase was a matter of such importance to them that they preferred to hasten it by yielding to his demand, however unjust, and waive their right to insist upon performance of the agreement according to its terms, there was no fraud perpetrated upon them in the legal acceptance of that word, however such conduct may be rated when tested by the highest standard of business morals.

The alternative proposition advanced by the appellant that, if liable at all, his inability is limited to the so-called "commission" received on the sale of the shares

5. PRINCIPAL AND AGENT: accounting. held by the plaintiffs is untenable. In the first place, the service performed by him in interviewing and soliciting the stockholders

in St. Louis and Omaha, and for which it is argued he could properly receive payment, was done in his representative capacity as agent and associate of the Ottumwa stockholders, who united in paying his expenses so incurred, and for any compensation or profit obtained by him therein he is bound to account. In the next place, it is

perfectly clear that appellant had no lawful claim or demand against Byllesby & Co. (except upon the contract of sale); but being in possession of the stock owned by himself and associates which it was his duty to deliver to said purchasers, he made such delivery the lever or instrument by which the additional money was extracted from them. Byllesby & Co. had already secured the remainder of the stock, and they paid this demand by appellant to secure the delivery of the shares controlled by him. The money so received, by whatever name it may be called, was in substance and effect the price of the delivery of the Ottumwa stock, and it is equitable and just that defendant account to the several owners on that basis.

Other objections urged to the decree are either not borne out by the record, or they necessarily fall with those we have already considered and overruled.

The decree of the district court is right, and it is *affirmed*.

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W. F. GIGRAY, Appellee, v. W. D. MUMPER, Appellant.

**Conditional sale: FORFEITURE: WAIVER: EQUITABLE JURISDICTION.** Although a contract for the sale of personal property reserving title in the seller until the purchase price was fully paid, authorized a forfeiture in case of default in payment, such right of forfeiture was not the exclusive remedy, but could be waived, and a suit in equity brought to enforce the claim as a lien against the property: as where there was a dispute as to the balance due and the seller waived his right to forfeit the contract, asked to have amount due ascertained and that he retain his lien on the property therefor, his cause was triable in equity and a motion to transfer to the law docket was properly overruled.

*Appeal from Clarke District Court.*—HON.<sup>e</sup> H. K. EVANS,  
Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

THIS is a suit in equity to recover the balance of purchase price of an undivided one-half of certain personal property, and to foreclose a conditional contract of sale thereof. The prayer of the petition is that plaintiff have judgment and decree for the balance due, and that the same be decreed a lien on the property described in the contract, and that a special execution issue thereon. Defendant moved to transfer the cause to the law side of the docket. The motion was overruled, and the defendant declined to plead further. Decree was entered for plaintiff for \$60 and making the same a lien upon the property, and ordering special execution. Defendant appeals.—*Affirmed.*

*O. M. Slaymaker*, for appellant.

No appearance for appellee.

EVANS, J.—The plaintiff sold to the defendant his undivided one-half interest in a certain stock of plumbing tools and materials for the consideration of \$200. Of this consideration \$25 was to be paid in cash and \$10 per month thereafter. The contract of sale reserved to the seller the title to the property until the consideration should be fully paid. The plaintiff claimed that the defendant had made payments to the amount of \$85, and no more, and that there was a balance due of \$115. The plaintiff averred, however, that the defendant claimed to have paid more and that a less sum was due than claimed by plaintiff, and plaintiff prayed for an adjudication of the question in dispute.

The argument of the appellant is that the plaintiff was entitled to maintain an action at law for the alleged balance of the purchase price, and that, whenever he elected

to bring such action, he waived his title to the property, and that he could enforce no lien thereon. The position is not well taken. It should be noted that the contract imposed a personal liability upon the defendant to pay the full purchase price. Although the contract therefor on its face reserved the title to the property to the seller until it was fully paid for, and gave to the seller a right to declare a forfeiture upon default of payment, such remedy was not exclusive. It is also true that a court of equity has power under some circumstances to declare such a contract a mere security, and to protect the purchaser from unconscionable forfeiture. In this case a large part of the purchase price had been confessedly paid. A dispute existed as to how much balance remained unpaid. The plaintiff waived his right to declare a forfeiture, but asked that he retain his security for the payment of such balance as should be found to be due. We think his petition stated a cause of action that entitled him to a hearing on the equity side of the court, and the motion to transfer was properly overruled. Whether the refusal of the court to transfer the case to the law side of the docket did preclude the defendant from denying the equity of the bill by his answer, or from claiming therein his right of trial to a jury we need not determine. The defendant did not plead. He stood upon his motion to transfer. For the purpose of that motion the allegations of the petition and the prayer for relief were conclusive upon the court. There was no error in the ruling and the decree is *affirmed*.

E. J. BREEN, Appellant, v. L. A. MAYNE and J. J. MAYNE,  
Appellees.

**Options: MANNER OF EXERCISE: HOW DETERMINED.** The manner of  
1 exercising an option is to be gathered from the language of  
the instrument creating it, aided by competent parol evidence  
of the intent of the parties.

**Same: ACCEPTANCE.** An offer without an acceptance does not con-  
2 stitute a contract, and generally the acceptance must accord  
with the terms of the offer.

**Option contract for sale of land: EXERCISE OF OPTION.** Under a  
3 contract agreeing, at the purchaser's option, to sell certain  
lands at any time before a fixed date at an agreed price pay-  
able on delivery of a deed, and with a further provision that  
if the buyer sold the land within the time the owner would  
make a deed to the purchaser and furnish an abstract showing  
perfect title, and would also accept the purchaser's note and  
mortgage for a deferred payment, it is held that payment of  
the purchase price was not essential to completion of the con-  
tract, and that the holder of the option could make his elec-  
tion to purchase in any lawful manner within the time limit,  
and within a reasonable time thereafter tender the purchase  
price.

**Same: STATUTE OF FRAUDS.** An option contract for the sale of  
4 land signed by the party to be charged is not within the statute  
of frauds, therefore the acceptance of the option need not be  
in writing.

**Same: ACCEPTANCE OF OPTION: EVIDENCE.** The acceptance of an  
5 option to purchase land must be unqualified and unequivocal  
and communicated to the party extending it, and must become  
by the acceptance a mutual binding contract. Evidence held  
insufficient to show acceptance.

*Appeal from Cerro Gordo District Court.*—HON. CLIFFORD  
P. SMITH, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED SATURDAY, FEBRUARY 20, 1909.

SUIT in equity for the specific performance of an option contract to convey land. The trial court dismissed the petition on the theory that plaintiff did not exercise his election within the time fixed by the option to purchase. Plaintiff appeals.—*Affirmed*.

*Blythe, Markley, Rule & Smith*, for appellant.

*Clarke & Chambers and Cliggitt, Rule & Keeler*, for appellees.

DEEMER, J.—Defendants were the owners of an undivided one-half of the property in controversy, and in October of the year 1906 plaintiff, through his agent Knapp, attempted to procure from J. J. Mayne an option upon this property. Knapp was referred to one McNider as being an agent to sell the land, and he so informed his principal. Plaintiff then went to McNider, and after some negotiations the following option was obtained by him:

For and in consideration of one hundred seventeen dollars in hand paid, and other good and valuable considerations rendered by E. J. Breen of Fort Dodge, Iowa, the receipt of which is hereby acknowledged, I, L. A. Mayne, of Cerro Gordo County, State of Iowa, agree to sell to said E. J. Breen, at his option, at any time on or before October 17, 1906, the following described premises situated in the county of Cerro Gordo and State of Iowa (here follows a description of the property), containing 117 <sup>20</sup>/<sub>100</sub> acres at the agreed price of one hundred and fifty dollars per acre and upon the terms as follows: Seventeen thousand five hundred and fifty dollars on delivery of deed. All of the deferred payments to draw interest at the rate — percent from the date of deed, payable annually. And said L. A. Mayne expressly agrees that in case that E. J. Breen sells said herein above described land at any

time within the term of his contract, that he will at the request of said E. J. Breen, execute and deliver to the purchaser, that may be named by said E. J. Breen, a good and sufficient warranty deed, with full covenants, conveying and assuring the fee simple of said premises, together with an abstract showing perfect title in giver of deed, and agrees to accept the purchaser's notes for the deferred payments, said notes being in amount, and time of payment as above set forth, and secured by — mortgage on above described premises. In witness of which said parties have hereto caused these presents in duplicate to be executed on this 17th day of April A. D., 1906. J. J. Mayne. L. A. Mayne. Witness, C. H. McNider.

The payment under this contract was made directly to McNider. Plaintiff then lived at Ft. Dodge, and was obtaining options upon this and other land for himself and others, thinking that they might prove profitable to a cement plant which they were then constructing in Mason City, Iowa. Soon after securing the option, plaintiff and his associates set men to work drilling upon the land, and it is contended that the results were satisfactory, that defendants were notified of that fact, and informed that he, Breen, would take the land under the option. There is no conflict in the testimony regarding some of the matters; but upon the determinative issues, or rather upon the inferences to be drawn from the testimony, there are serious disputes both of fact and law. The option was obtained in April of the year 1906, and it expired on October 17th of the same year. On September 20th, plaintiff wrote one of the defendants asking for an abstract to the land, saying that he would like a little time before the option expired to examine it and to get matters fixed up. Mayne did not answer in person, but on October 3d, McNider wrote, sending an abstract and saying, "We are ready to furnish deed." October 4th Breen wrote McNider acknowledging the receipt of the abstract, and saying he would have his attorneys examine it in the near future.



On October 15th Breen returned the abstracts to McNider by mail, calling his attention to the defects pointed out by his attorney, and saying, "I take it that these matters can be fixed up." Breen went to Mason City on the 16th, going to the abstractor's office to see if the defects pointed out in the abstract had been corrected, and learned they had not been. He then went to the bank where McNider had his office, and found that he (McNider) had gone away (to St. Louis as reported), and that he would not be back for a few days. He also learned that his letter to McNider inclosing the abstracts had not been opened. He then, it is claimed, drove to the Mayne home and found no one there. He endeavored to find one of the Maynes in Mason City, but was unable to do so. Returning to his home without seeing either McNider or the defendants, he again came to Mason City on the 19th or 20th day of October and called upon McNider. He (McNider) returned the abstracts to Breen, and Breen then went in search of the Maynes. He finally found them, and Mr. Mayne, so it is claimed, pursuant to his previous request, promised to go to Mason City to try to get the title adjusted and the matter of the sale fixed up. Whatever the truth about this, Mayne did not come to Mason City to see plaintiff, but according to his, plaintiff's, testimony, he, Mayne, avoided him. It appears without dispute that after midnight on October 17th the Maynes gave another option upon the land to some other parties representing a rival cement plant, in which the optionees agreed to hold the Maynes harmless for refusing to carry out the one theretofore given the plaintiff. It seems that after the option was given plaintiff, the Maynes indicated a desire to reserve a part of the lands covered by their option, and that they continued thus to talk down to about October 20th. McNider returned to Mason City on October 19th, and on October 20th he wrote plaintiff acknowledging the

receipt of the abstracts and saying that he would have the corrections made as indicated in Breen's letter.

In a general way the matters so far recited are undisputed, save defendants say that McNider was not at any time their agent in the matter, and that what he did in the way of addressing letters was simply an accommodation. The chief dispute arises over a claim on plaintiff's part that he orally exercised his option within the time fixed, and that the option contract then and thereupon became a contract of sale. This is denied by defendants, and they further say that as a matter of law there could be no binding acceptance except by a payment or tender of the purchase price within the period fixed by the option. The first is, of course, a question of fact, and the latter of law, or of mixed law and fact. We shall first take up the legal proposition, for if defendants' contention in this respect be sustained the decree is correct, for the reason that it is not contended that plaintiff paid or offered to pay the purchase price before October 17th, the time when, by the broadest construction, the option expired.

The only fixed rule regarding the manner of the exercise of an option under a contract granting it, is to discover from the language of the instrument, construed in the light of competent parol testimony, the intent of the parties with reference thereto. It may be that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land—the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case, there is an election to sell, upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and in the other

1. OPTIONS:  
manner of  
exercise: how  
determined.

there is an election to take the land upon the terms proposed, payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into.

It is important in such cases to distinguish that which pertains to the performance of a contract from that which pertains to its making. To make any sort of a contract,

2. SAME:  
acceptance.

there must be a meeting of minds upon a given subject. An offer without acceptance is not a contract, and as a rule the acceptance to be binding must be in accord with the terms of the offer, and not in some other manner. In other words, the party making the offer may prescribe the mode of acceptance, and to constitute a binding contract this method must be followed. The distinctions here noted are pointed out with great clearness in *Watson v. Coast*, 35 W. Va. 463 (14 S. E. 249). See, also, *Pomeroy on Contracts*, section 387; *Minneapolis Co. v. Cox*, 76 Iowa, 306; *Bundy v. Dare*, 62 Iowa, 295; *Lockman v. Anderson*, 116 Iowa, 236; *Myers v. Stone*, 128 Iowa, 10; *Page on Contracts*, sections 48 and 49.

Now, going to the option in this case, it appears that defendants agreed to sell to plaintiff at his option any time on or before October 17, 1906, one hundred and seven-

3. OPTION CON-  
TRACT FOR  
SALE OF LAND:  
exercise of  
option.

teen acres of land at an agreed price, and upon the following terms, "\$17,550.00 on delivery of the deed." Defendants also agreed that if Breen sold the land at any time within the option they would make deed to the purchaser and would make abstract, showing perfect title. They also agreed to accept the purchaser's notes for the deferred payments, and to take a mortgage securing the same. It will be noted that the payment of the purchase price was to be made on delivery of the deed; that Breen had authority to sell the land at any time covered by the option, and that defendants agreed to make deed to the

purchaser and to make abstract showing perfect title. The agreement was to sell the land for \$17,550 to plaintiff at his option exercised at any time before October 17th, payment to be made on delivery of the deed with abstract showing perfect title, and the deed was to run to Breen or to any person to whom he might sell. We are constrained to hold that payment of the purchase price was not essential to the completion of the contract. Plaintiff might make his election in any lawful method before the expiration of the time limit, and would be compelled in that event to make tender of the purchase price within a reasonable time and demand a deed either to himself or to the party to whom he had sold. It was recognized that plaintiff had something to sell or transfer before making payment for the land; and the delivery of the deed and the payment of the purchase price were simply dependent covenants which did not go to the formation of the contract but to its performance. These views find support in *Gradle v. Warner*, 140 Ill. 123 (29 N. E. 1118); *Gibson v. Heating Co.*, 128 Ind. 240 (27 N. E. 612, 12 L. R. A. 502); *Bogle v. Jarvis*, 58 Kan. 76 (48 Pac. 558); *Howe v. Watson*, 179 Mass. 30 (60 N. E. 415); *Mason v. Decker*, 72 N. Y. 595 (28 Am. Rep. 190); *Ellsworth v. R. R.*, 31 Minn. 543 (18 N. W. 822); *Myers v. Stone*, 128 Iowa, 10; *Clark v. Gordon*, 35 W. Va. 735 (14 S. E. 255); *Peterson v. Chase*, 115 Wis. 239 (91 N. W. 687); *Boston Co. v. Rose*, 194 Mass. 142 (80 N. E. 498); *Primm v. Wise & Stern*, 126 Iowa, 528; *Webb v. Hancher*, 127 Iowa, 269.

With the law question settled, we go now to the controlling question of fact, Was there an acceptance of the option by the plaintiff, or such an election on his part as bound him to perform the contract? In this connection we may say that the statute of

4. SAME: statute of frauds.

frauds cuts no figure. Plaintiff is not the

party sought to be charged, and to answer the requirements

of that statute it is only necessary that the contract be signed by the party to be charged, etc. Of course, to make a valid and enforceable contract of an option there must be an unqualified acceptance thereof and a full performance of all conditions precedent; but the contract when completed need not be in writing unless required by statute. *Perkins v. Hadsell*, 50 Ill. 216; *Yerkes v. Richards*, 153 Pa. 646 (26 Atl. 221, 34 Am. St. Rep. 721).

This brings us to the disputed fact question in the case: Was there an unqualified election by plaintiff communicated to defendant to accept the option, and such a meeting of the minds as to make a valid and enforceable obligation against the defendants? A reading of the correspondence which passed between the parties, and to which we have already referred, clearly shows that there is nothing in these letters which constitutes an unqualified election to accept the option and become bound to pay the purchase price within the time limited. But appellant contends that there is testimony of an oral acceptance communicated to the defendant within the time limited by the option. This acceptance could only be made by plaintiff in person, or by someone having authority from him to do so. There is testimony from three or four people, who did not represent plaintiff in the matter of the land deal, to the effect that they told defendants they thought Breen would take the land. But the only real testimony as to an acceptance by plaintiff is the following: Mr. Mayne was anxious to know whether plaintiff intended to exercise his option, and he requested one Hubbard to ask him, Breen, what he intended to do. In response Breen said: "I have been a good fellow so far, and I guess I will have to take the land." This was said in defendant's presence, but not to him, and plaintiff's conduct thereafter shows that he did not intend this to be an election on his part to take the land, but rather an expression of his opinion as to what

5. SAME:  
acceptance  
of option:  
evidence.

he would do in the future. It was not regarded by defendants as an election to take the land. The correspondence between the parties after that date indicates that they still regard the matter as an unaccepted offer. It will not do to establish a rule in these cases which will allow an optionee to "play fast and loose" as interest may dictate. The acceptance of the option, or the election when made, must be unqualified and unequivocal, must be communicated to the party giving the option in no uncertain manner, and be such that after it is exercised it becomes binding upon the party exercising it. That is to say, it must assume the form of a contract proper as distinguished from a mere option or offer. We do not think the testimony in this case shows such an election to take the land or to accept defendant's offer as made a binding contract. Moreover, we may say that we do not think defendants did anything to prevent plaintiff from indicating his election or acceptance of the offer of sale. Plaintiff attempts to make such a showing, but this is negatived by defendants' testimony. The letter written by McNider after his return from St. Louis is not binding on defendants, and, even if it were, it would amount to nothing more than a waiver of the time for the payment of the purchase price.

We have gone over the record with care, and find no reason for disturbing the decree. It is therefore *affirmed*.

SHERWIN, J., taking no part.

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R. A. ELZY, Appellee, v. THE ADAMS EXPRESS COMPANY,  
Appellant.

**Carriers:** DELAY IN SHIPMENT: SPECIAL DAMAGES. Where an express company had notice at the time of shipping a shaft for a steam shovel outfit that the outfit had broken down, and that it and the crew of men operating the same would remain idle until the shaft was received, the company, if negligent, was liable

in damages for the actual rental paid by plaintiff for the use of hired machinery, the fair rental value for the use of his own machinery, and the wages actually and necessarily paid the workmen.

**Same:** NOTICE. Where the shipper informed the agent that he was 2 shipping an iron shaft of considerable weight by express rather than by freight to save time, that a steam shovel outfit had broken down and that it and the crew would be idle until the shaft was received, the notice was sufficient to apprise defendant that special damages would result to plaintiff if shipment was delayed.

**Credibility of witnesses:** STATEMENT OF COURT: EFFECT. A state- 3 ment of the trial court that he believed two witnesses testifying adversely to each other concerning a state of facts were both honest in their statements and equally credible in character, did not amount to a finding that the evidence was in equipoise on the disputed question, so as to invalidate a conclusion in favor of one contention which had support in the other circumstances of the case.

**Damages:** RENTAL VALUE. The owner of machinery may recover 4 damages for its rental value when deprived of its use through the fault of another, upon proof of the value of its use, although it is not shown that the same had a rental value.—McClain, J., dissenting.

*Appeal from Marshall District Court.*—HON. C. B. BRADSHAW, Judge.

SATURDAY, FEBRUARY 20, 1909.

THIS is an action for damages against the defendant as a common carrier for negligent delay in the delivery of a consignment. The damages claimed consisted of a number of items. There was a trial to the court without a jury. Judgment for the plaintiff for a part of his claim only. Both parties appeal. The defendant first perfected its appeal, and is designated as appellant.—*Affirmed* on defendant's appeal. *Reversed* on plaintiff's appeal.

*Anthony C. Daly*, for appellant.

*Binford & Farber*, for appellee.

EVANS, C. J.—In January, 1906, the plaintiff was a general contractor, and had been such for many years prior thereto. At the time stated he was engaged in the performance of a contract for grading and constructing a railroad right of way for the Big Four Railway Company near Indianapolis, Ind. The machinery in use by him for such purpose consisted of a steam shovel, two locomotives, forty-two dump cars, and a spreader car, with crews numbering eight men. The steam shovel was the property of the Iowa Central Railway Company, and was leased to the plaintiff at a specified rental per day. The locomotives were the property of another railway company, and, in like manner, were leased to the plaintiff. The other property enumerated belonged to the plaintiff. On January 7, 1906, the swing shaft of the steam shovel was broken, rendering the operation of the steam shovel impossible until another could be obtained. The stoppage of the steam shovel rendered it impossible to utilize the rest of the outfit or crew. The foreman at Indianapolis wired the facts to the home office at Marshalltown. Thereupon another shaft was obtained from the Iowa Central Railway Company at Marshalltown, and was delivered to the defendant for immediate shipment to the plaintiff as consignee at Indianapolis, Ind. The business at Marshalltown was transacted for plaintiff by one Baumgardner, his bookkeeper. Baumgardner personally saw the local agent of the defendant company, and explained to him the reasons for the shipment and the importance of a quick delivery. He stated to him, in substance, that plaintiff's outfit would be idle until the shaft could be obtained, and stated, also, what the outfit consisted of. The shaft weighed from three hundred to five hundred pounds, and was delivered to the defendant at such time on the 8th of January that in the ordinary course of transportation it would reach Indian-



apolis the next day. The bill of lading which usually attends the shipment actually did reach Indianapolis on the next day. But through some negligence of the defendant the shaft itself was sent to some other destination, and did not reach the Indianapolis office until January 20th. The plaintiff could not obtain the shaft in the market at any other place, nor could one have been manufactured in a less period of time than three weeks. The plaintiff was therefore helpless to proceed with his work until this identical shaft should reach him. The items of damage claimed by him were the rentals actually paid by him for the use of the steam shovel and the locomotives during the period of negligent delay, and the wages actually and necessarily paid by him to the men in charge and the fair rental value of his own property, namely, the dump cars and the spreader car during such period of delay. The court allowed him the rentals and wages actually paid by him, but refused to allow him the rental value of his own property. From the judgment of allowance the defendant appeals. From the refusal to allow the plaintiff appeals. We will consider first the questions arising upon the defendant's appeal.

I. It is contended by the defendant that the damages allowed by the lower court were remote and consequential and were not within the contemplation of the parties when the contract of shipment was entered into. The lower court found that at the time of the shipment the defendant had notice of the very situation as it existed, and that it therefore knew the consequences which would result from negligent delay in delivery. This finding of the lower court has sufficient support in the testimony. The plaintiff has sued in tort and not on the contract. The present weight of authority is that where defendant has notice at the time of shipment of the existing facts out of which special damages would naturally arise to plaintiff by negli-

1. CARRIERS:  
delay in  
shipment: spe-  
cial damages.

gent delay in delivery, the defendant may be held liable for such special damages. The general rule in torts is that all damages naturally and proximately resulting from the injury are recoverable. This rule is construed to include special damages, such as are involved in this case, where the carrier has notice of the fact that delay in the delivery of goods will result in special damage to the shipper. *Cowan v. Western Union Telegraph Co.*, 122 Iowa, 379; *Weston v. Boston & Maine Ry. Co.*, 190 Mass. 298 (76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330); *Missouri & Pacific Ry. Co. v. Peru Van Zant Co.*, 73 Kan. 295 (85 Pac. 408, 87 Pac. 80); *Central Trust Co. v. Savannah & W. Ry. Co.* (C. C.) 69 Fed. 683.

II. It is contended by the defendant that the notice to the local agent at Marshalltown was not sufficiently definite to bring the case within the rule of special damages.

2. SAME:  
notice.

The testimony of Baumgardner on that question is as follows: "Bartmess [the local agent] asked me about the weight, and said: 'Why don't you ship it by freight, and save some expense?' I told him the steam shovel was broken down, and we were in a hurry to get it over there to get the shovel in operation. I told him the whole crew was idle until we could get the shaft over there; that the whole outfit was idle until we could get the shaft over there. I told him the outfit consisted of a steam shovel with two engines, forty-two dump cars, and a spreader car, and the men, of course, that were necessary to operate them, known as a steam shovel gang or outfit. I do not remember that I said anything at that time about the number of men that were employed on it." Assuming this testimony to be true, as the court found it to be, we think it was sufficient to bring the plaintiff within the rule as to special damages. It clearly conveyed knowledge to the defendant that special damages of the nature now claimed would result to plaintiff if shipment

were delayed. This is a fair compliance with the spirit of the rule requiring notice in such cases.

III. Bartmess, the local agent of the defendant company, denied the statements of the witness Baumgardner as to the alleged notice. The trial court in the discussion of this evidence stated that he believed both

3. CREDIBILITY OF WITNESSES: statement of court: effect. witnesses to be honest in their statements and equally credible in their character, but he found the facts nevertheless in accordance with the affirmative testimony of the witness Baumgardner. Counsel for defendant argues earnestly that the statement of the court concerning the two witnesses amounted to a finding that the evidence was in equipoise on this question, and that, therefore, there was no preponderance in favor of the plaintiff. The argument in support of this contention is ingenious, but not sound. The court did not find that the testimony of the two witnesses was equally credible or of equal weight. It found the facts against the testimony of Bartmess without imputing to him any intentional false swearing. The circumstances of the case corroborate the testimony of Baumgardner. The very fact that a non-perishable article weighing from three hundred to five hundred pounds should be sent by express, instead of by freight, was itself a circumstance which might naturally attract attention to itself, and tends to corroborate plaintiff in his statement that Bartmess inquired why it was shipped by express instead of by freight. The defendant's point in this respect is not well taken.

IV. The plaintiff introduced evidence of the rental value of the use of his own property, namely, the dump cars and the spreader car during the period of delay. This consisted of the testimony of two witnesses,

4. DAMAGES: rental value. each of whom testified that in his opinion the smaller cars were each worth fifty cents a day, and the larger ones \$1 a day, and the spreader car \$1.25 a day, making a total of \$275. This testimony was

not based on any market rental rate, because there was none, and the defendant urged objections to its competency and sufficiency, both at the time it was offered and at the time of the submission of the case. The court admitted the evidence as competent, but refused to allow these items in its final judgment, and as a reason for such refusal stated that he "thought it was too much in the nature of profits." The testimony on the subject was not strong, but it was uncontradicted. The plaintiff urges on his appeal that the items testified to constituted a proper measure of damages, and that they were not in the nature of profits, as the term is used in such cases, and that he is entitled to a reversal on that ground and to an order for an allowance of the items. If the court had refused the items because of the insufficiency of the testimony, we should deem the question quite beyond our reach. The writer is of the opinion that the finding of the court should be so construed, and that the reason given by the court was intended to characterize the weight and sufficiency of the evidence, rather than the nature or competency of it. If this position were accepted, it would require an affirmance of the judgment on both appeals. If, however, the reason given by the court is to be deemed as referring to the nature of the evidence as improper measure of damages, it can not be sustained. As a measure of damages, it is of the same nature as the rentals which the court actually allowed. The majority of the members of the court are of the opinion that the finding of the court should be construed as equivalent to an allowance of the items so far as the weight of evidence is concerned, but a rejection of the same, because not proper measure of damages. On this view there must be a reversal on plaintiff's appeal and an affirmance on defendant's appeal. In pursuance of the construction thus put upon the findings of the lower court, plaintiff will be permitted to take judgment in this court for the items in question.

*Affirmed* on defendant's appeal. *Reversed* on plaintiff's appeal.

MCCLAIN, J. (dissenting).—On plaintiff's appeal the holding of the majority is that there should be a recovery of rental value of plaintiff's machinery while it lay idle on account of defendant's fault, although it does not appear that such machinery had a rental value or was kept for rent or could have been rented. As it seems to me, this is plainly wrong. Profits lost may be allowed where reasonably definite and certain; but here there was not a suggestion in the evidence of even a possibility that plaintiff would have received any rental for his machinery if defendant's contract to carry promptly had been performed; nor is there any suggestion that any equivalent of rental value of his own machinery was lost through defendant's fault. The rule that in such a case as this the recovery should be limited to compensation, which should not include damages which are merely speculative and wholly uncertain, is so well settled that I do not care to cite authorities or do more than express my dissent.

I think that on plaintiff's appeal there should be an affirmance.

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EMMA R. GRIFFITH V. MERCHANTS LIFE ASSOCIATION OF  
BURLINGTON, IOWA, Appellant.

**Benefit insurance: PAYMENT OF ASSESSMENTS: LAPSE OF POLICY.** An

I assessment association authorized a bank to receive assessments from its members, acknowledge receipt and remit the same, but directed it not to receive assessments past due unless specially authorized. The decedent was a depositor at the bank and paid his assessments there and at one time told the cashier to pay his assessments, if at any time he neglected it, and to charge the same to his account. *Held*, that the alleged agreement with the cashier did not amount to payment of an assessment of which the cashier had no notice, but by reason of its nonpayment the policy had lapsed.

**Same: PLEADING: AMENDMENT AFTER TRIAL.** Where no issue as to the validity of an assessment was raised until after submission of the cause, that question could not be brought into the case by amendment without first setting the submission aside and giving the association an opportunity to be heard

*Appeal from Taylor District Court.*—HON. H. K. EVANS,  
Judge.

SATURDAY, FEBRUARY 20, 1909.

**ACTION** in equity to recover on an insurance policy. There was a judgment for the plaintiff, from which the defendant appeals.—*Reversed.*

*Haddock & Son* and *Seerley & Clark*, for appellant.

*W. M. Jackson*, for appellee.

SHERWIN, J.—The appellant is an assessment association, and in 1903 it issued a policy of \$2,000 on the life of Sheridan D. Griffith. All dues and assessments were regularly paid until April 30, 1907, at which time there became due on said policy an assessment or call that was made in March. Whether this assessment was paid is the only question for determination. The defendant had made the Citizens' Bank of Bedford, Iowa, its depository, and had directed its certificate holders in that vicinity to pay their calls at said bank. The authority under which the bank acted for the defendant, and its only authority to transact its business, was contained in a writing which appears in the record. The authority therein conferred upon the bank, so far as collections were concerned, was contained in the following excerpts from the writing: "We furnish you with the necessary remittance blanks. Our members will present deposit slips. Stamp the call 'paid' and mail the addressed postal card to us. . . .

Unless specially authorized, do not receive any money after the close of the month in which this call is payable. . . . Blank deposit tickets will be prepared by our solicitors for signature, for such cash as may be left with you on our account, and the business will be conducted in such a manner as to give you the least possible annoyance." The assessments under this policy were made quarterly, and were paid at the bank. Mr. Griffith paid the January, 1907, assessment, and at the time of making such payment he said to the cashier of the bank: "Now, my time was pretty near up for this last assessment. . . . Now, if I should ever forget to come in and pay my assessment, you pay it for me and charge the same to my account." To this statement and request Mr. Long, the cashier, answered: "All right." Mr. Griffith was a depositor in the bank in question, and the record shows that at the time of the January talk with the cashier, and at all times thereafter until his death on the 14th of May, 1907, he had a balance due him of more than enough to pay the April assessment. The call for this assessment was made in March and directed to Mr. Griffith. He did not pay it, nor was it paid by the bank, and there is no evidence tending to show that either the bank or Mr. Long, its cashier, had any knowledge of the call that had been sent to Mr. Griffith.

The appellee contends that Mr. Griffith directed the bank to pay his assessments out of the funds in its hands and charge the same to his account, and that, if they failed to do so, it was the negligence of the defendant's own agent and would not defeat her right to recover. We are of the opinion that the contention can not be sustained on any sound principle of law or equity. The authority given the cashier by Mr. Griffith was limited. He had no authority to pay an assessment from Mr. Griffith's funds unless it was necessary to do so to protect Mr. Griffith against his

1. BENEFIT  
INSURANCE:  
payment of  
assessments:  
lapse of  
policy.

own neglect. In other words, Mr. Griffith authorized the cashier to pay only when it became apparent to him that Griffith had himself forgotten the assessment and that the policy would lapse unless it was paid by him. The bank was not the general agent of the defendant as to any matter. On the contrary, its power was limited. It could accept payment of calls, stamp the calls paid, and mail the addressed postal card and remit at the end of the month. It was no part of the bank's employment to push collections for the defendant. Nor was it employed to protect members of the defendant association against their own carelessness or neglect. The assessment or call in question was sent directly to Mr. Griffith by the defendant. It did not pass through the bank, nor did the bank or its cashier have express notice that such a call had been made, or that Mr. Griffith had neglected to pay it. The only knowledge that the bank had was that Mr. Griffith was a member of the defendant association when he paid the assessment in January, and that a call had been made on other members thereof at the time in question.

It is said, however, that the bank should have had in mind Mr. Griffith's membership, and should have known that a call had probably been made upon him for the last assessment. If the appellee's contention as to this be conceded, it still remains true that, as Mr. Griffith had the right to pay the call directly to the home office, the bank acting as the agent of the defendant was not bound to know that he had not so paid it or that it was unpaid when the time within which payment could have been made had expired. That the alleged agreement did not constitute a payment is clear. It does not bring the case within the rule announced in the *British & American Mortgage Co. v. Tibballs*, 63 Iowa, 468, and *Griffin v. Erskine*, 131 Iowa, 444, relied upon by the appellee.

After the close of the trial, but on the same day, the plaintiff, without notice to or knowledge on the part of



the defendant, filed an amendment to the petition alleging that the deceased was not in arrears at the time of his death, and that all sums and assessments had been fully paid. This amendment states that it was made to conform the pleadings to the proof. No issue was theretofore made as to assessments. In her petition the plaintiff specifically alleged as follows: "Your orator further shows that, by the rules and regulations of the said defendant, certain small amounts of dues became due and owing from Sheridan D. Griffith on account of his membership which should have been paid on or before April 30, 1907." And the amount thereof was alleged to be \$5.60. Moreover, it was stipulated on the trial that an "assessment was issued or call made for the month of April, 1907," and, further, "that said assessment or call has never been paid to the company, and at the present time remains unpaid." It is manifest that the amendment to the petition not only did not conform to the proof, but that it directly contradicted the original petition and the stipulation that had been made during the trial. The trial court held that the assessment had been paid and refused to consider the question raised by the amendment in question. It is now too late to urge the proposition that no legal assessment was shown. If the appellee concluded, after the submission in the lower court, that such an issue should have been made, steps should have been taken to set aside the submission, and the appellant should have been given an opportunity to meet the changed front.

For the reasons pointed out, the judgment must be *reversed*.

E. P. BARRINGER, Appellee, v. HENRY E. DAVIS and wife,  
Appellants.

**Public lands: GRANT IN AID OF RAILROADS: UNSURVEYED LANDS: EF-**

**1 FECT OF RESURVEY.** Where an entire government section bordering upon a lake has been granted to the State to aid in the construction of a railroad, and upon compliance by the railway company with the terms of the grant a patent has issued conveying the section to the State, the government no longer has any legal or equitable title therein; and if by mistake some small part of the subdivision was left unsurveyed its subsequent survey by direction of the Interior Department will not effect a restoration of the same to the public domain, but any apparent title thereto either in the government or State is held in trust for the benefit of the railway company and its grantees. Where, however, the meander line, which is not ordinarily a boundary, is established so far from the shore line as to indicate gross error or fraud and the government has done nothing to part with its title to the unsurveyed land, it may cause a resurvey of the same and dispose of it as government land. In the instant case the unsurveyed land is held to be part of the original grant.

**Boundaries: MEANDERED LAKES: EXCESS LAND: TITLE: ESTOPPEL.** Where

**2** the original government survey coincides with the shore of a lake and terminates at meander posts on the lake shore, which is marked as the boundary, the shore and not the meander line constitutes the boundary; and a conveyance with reference to such survey by the patentee of the government subdivision, to which it had held the title for a long series of years without questioning the survey, carries the title to the shore of the lake, and the title to the land beyond the meander line can not thereafter be questioned, in the absence of any showing of an intention to reserve the same, or of knowledge of the discrepancy between the survey and the actual acreage, or that the grantor was misled as to the true situation.

**Same: RESURVEY OF PATENTED LAND: JURISDICTION.** Where the gov-

**3** ernment has parted with its title to lands and a controversy arises between persons asserting conflicting claims under grants or patents based upon an official survey, such survey is conclusive though grossly incorrect, and the land department has

no jurisdiction to affect the rights of the parties by a resurvey and issuance of a new patent.

**Conveyances: REFERENCE TO PLATS: EFFECT.** Where lands are conveyed  
4 according to the official plat of a survey thereof, the plat and all its notes, lines, descriptions and land marks become a part of the conveyance the same as though such descriptive features were written out therein, and are controlling so far as the limits of the tract are concerned.

**Conveyances: DESCRIPTION: NATURAL OBJECTS: COURSE AND DISTANCE.**  
5 Where the description in a deed refers to natural objects, as a lake shore, or even a marked line, they will control both course and distance and carry all the land within their boundaries though much greater in quantity than that mentioned.

McClain, J., dissenting.

*Appeal from Clay District Court.*—HON. A. D. BAILIE,  
Judge.

SATURDAY, FEBRUARY 20, 1909.

ACTION in equity to quiet plaintiff's title to land. The defendants deny plaintiff's claim of title, and by cross-bill ask that the same be quieted in themselves. Decree for plaintiff, and defendants appeal.—*Reversed* on rehearing.

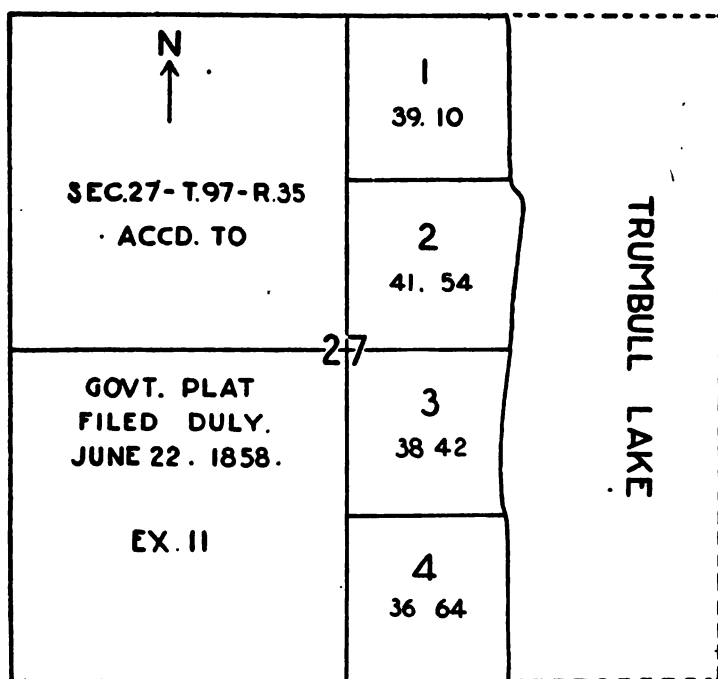
*Buck & Kirkpatrick and Glass, McConlogue & Witmer,*  
for appellants.

*E. B. Evans,* for appellee.

WEAVER, J.—The land in controversy is a part of section twenty-seven, township ninety-seven, range thirty-five, in Clay County, Iowa. The original government survey of this section was completed about the year 1857, and by act of Congress, approved May 12, 1864, it was included in a grant of land to aid in the construction of a railroad crossing the northern portion of this State. The company which first undertook the construction of this

road and to secure the benefit of the grant was known as the McGregor & Western Railroad Company whose rights were subsequently acquired by the Chicago, Milwaukee & St. Paul Railway Company. The original survey developed the fact that the eastern portion of that section was covered or bordered by a permanent body of water known in the record as Trumbull Lake, and for the purposes of measurement of the land area a meander line was established on that side. According to the report as disclosed by the records the section was surveyed and mapped as indicated by the following plat which for convenience of reference we designate,

PLAT A.



These records show that, following the usual method,

the southwest corner of the section was first established, and that from this point the south line, being the line between sections twenty-seven and thirty-four, was run eastward forty chains for the quarter post, and at fifty-eight chains and twenty links it intersected the lake, where a post was set for the meander course. Returning to the southwest corner the western line was then established, and from the northwestern corner of the section the north line, being the line between sections 27 and 22, was run forty chains for the quarter post, and at fifty-nine chains and sixty links it intersected with the lake, where another meander post was set. The meander line was then run from the post at the southeast intersection with the lake as above indicated in a northerly direction, changing the course somewhat at three intermediate points, and closing upon the meander post at the northeast intersection with the lake as represented upon Plat A. As thus surveyed, the north half of the section, with which alone we are at present concerned, was subdivided into the northwest quarter containing one hundred and sixty acres; lot one containing thirty-nine and ten one-hundredths acres, and lot two containing forty-one and fifty-four one-hundredths acres, making an aggregate in the half section of two hundred and forty and sixty-four one-hundredths acres. It will be noted that Plat A of the original survey shows no meander line as distinguished from the shore line of the lake, and lots one and two are there described and platted as covering all of the land up to the lake shore. The necessary inference from the survey and plat is that the meander line thus established coincided with the shore line, or so nearly so that they were mapped as one.

The railway having been constructed, the State of Iowa which received the grant for that purpose issued its patent to the Chicago, Milwaukee & St. Paul Railway Company for said lands with others, under date of April 26, 1880, describing the tracts as shown by the original

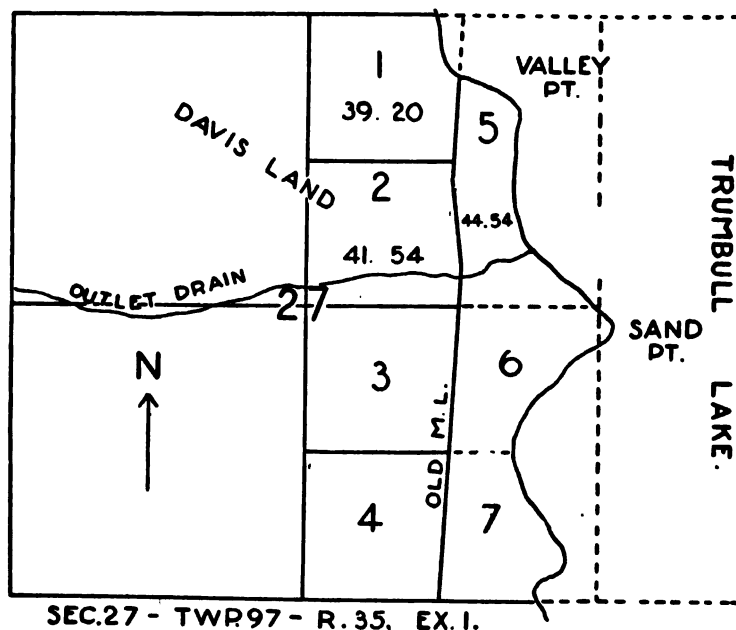
survey. Soon after the issuance of patent to the northwest quarter, and lots one and two of section twenty-seven, they passed by proper conveyance from the railway company to the Iowa and Dakota Land Company, which in 1886 entered into a written contract to convey said described lands to James Valley. At or soon after the date of this contract, Valley entered into possession of the property, making use of it as a farm, and on February 16, 1895, obtained a deed of conveyance therefor pursuant to the terms of his said contract of purchase. On December 5, 1895, Valley conveyed to J. W. O'Neil, who some months later conveyed the same to John Steen, by whom on February 23, 1899, it was conveyed to Ellen Valley, wife of James Valley. Valley and wife appear to have been divorced about this time, and the latter quitclaimed her title to the former on February 24, 1900. A year later James Valley conveyed to James E. Moore, who on August 7, 1901, conveyed to Henry E. Davis, who is the principal defendant herein. In each of these conveyances, the land is described by subdivisions as indicated by the original survey, to wit, the northwest quarter and lots one and two in section twenty-seven. In most of them no mention is made of the number of acres, but in the deed from the railway company to the land company the description is stated as containing two hundred and eighty and seventy-four one-hundredths. In the deed from James Valley to James E. Moore it is stated to contain three hundred and twenty-one acres, while in the above-mentioned deed from Moore to Davis the area is said to be two hundred and forty acres. A year after the date of the last-named deed Moore executed a second deed to Davis, purporting to be to the land lying between lots one and two and Trumbull Lake, and reciting that such conveyance may already have been effected by the deed of August 7, 1901. It is the claim of the defendant that the title thus derived vested in him

and his grantors, under the railway grant, a good and indefeasible title to all the lands in the north half of section twenty-seven not covered by the lake, including such land, if any, be the same more or less, as lies between the meander line and the shore of the lake. He also alleges that on obtaining the contract of purchase as aforesaid in 1886, his grantor, James Valley, took possession of all of said land to the lake shore under color of title and claim of right, and that from said date down to the commencement of this action the said Valley and his successive grantors have continued in open, notorious and adverse possession of said premises, and that by reason thereof the title now held by said defendant and derived as aforesaid is invulnerable.

The plaintiff asserts title to so much of the north half of section twenty-seven as lies between the lake shore and the meander line established by the original survey, and traces his claim as follows: In the year 1900 one J. C. Chapman and Myron Valley, a son of James Valley, petitioned the commissioner of the General Land Office at Washington, representing that by means of mistakes in the original survey in the location of meander lines about the shores of different alleged lakes in that vicinity a large area of arable lands had been left unsurveyed, and asked that an order for its survey be made, to the end that such lands might be opened to settlement and improved like other portions of the public domain. Upon this application M. P. McCoy was appointed engineer to make a report and survey of the tract or tracts thus designated. Pursuant to this authority the engineer proceeded to make a survey of more or less extensive tracts in eleven different sections in townships ninety-six and ninety-seven. A report of this survey was made in the year 1901, and some time thereafter the report was approved by the department at Washington. The manner in which this latter

survey affects the lands in section twenty-seven is shown by the following plat:

PLAT B.



It will be observed that as traced by this survey the original meander line does not close upon the lake shore at the south end, but is located at a point some distance west therefrom, thus leaving between said line and the lake a body of land, a portion of which, lying within the north half of the section and marked lot five, containing forty-four and fifty-four one-hundredths acres, is the subject of the dispute now under consideration. McCoy's report, so far as it affects this particular tract, is, in substance, that running east from the southwest corner of that section a distance of fifty-eight chains and twenty links for the meander post as indicated by the original survey said line fell short of intersection with the lake, and had



to be extended twelve chains and fifty links further to reach the shore. As we understand his notes the southwest corner of the section and the quarter post on the south side as established by the original survey were discovered and recognized, but no artificial monument of the original meander corner appears to have been found. The engineer marked the point reached at fifty-eight chains and twenty links east from the southwest corner for the old meander corner, and at a point twelve chains and fifty links easterly therefrom established and marked a new corner. After the approval of the later survey a patent was issued to said lot five to the State of Iowa for the use of the Chicago, Milwaukee & St. Paul Railway Company, to which the State thereafter issued its patent. In 1902 the railway company quitclaimed its interest in the land to plaintiff. Upon the trial of the issues joined upon these conflicting claims of title the district court found for the plaintiff, and the defendants appeal.

The foregoing statement makes it clear that the appellee stands in the shoes of the railway company, and can not successfully assert any claim or title to the land which would not be available to said company had it never quitclaimed to him. The land grant of May 12, 1864, and subsequent patent to the State of Iowa in trust for the purposes of said grant had the effect to vest in the railway company the equitable title to section twenty-seven, not merely the marked subdivisions thereof, but to the entire section, or at least to so much thereof as had not already been otherwise appropriated; such title vesting not later than the date when the road was completed. The land grant having been made to the State, and the railway company having constructed the road according to the terms of the grant, the United States no longer had title, legal or equitable, to any part of said section, and if by any mistake any part of it had been left unsurveyed, its subsequent survey under

1. PUBLIC LANDS:  
grant in aid  
of railways:  
unsurveyed  
land: effect  
of resurvey.

an order from the Interior Department would not have the effect to restore such land, or any part of it, to the public domain. Upon the fulfillment by the company of the provisions of the grant it became entitled to receive a patent therefor from the trustee, and said title, when received, related back to the date of the grant. *Grinnell v. R. R. Co.*, 103 U. S. 739 (26 L. Ed. 456); *Schulenberg v. Harriman*, 88 U. S. 44 (22 L. Ed. 551); *Wisconsin R. R. v. Price*, 133 U. S. 509 (10 Sup. Ct. 341, 33 L. Ed. 687); *Deseret Salt Co. v. Tarpey*, 142 U. S. 241 (12 Sup. Ct. 158, 35 L. Ed. 999).

The fact, if it be a fact, that the original patent described the section by its subdivisions only can make no difference, so long as the other conceded fact exists that the grant included the entire section, and that the benefit of said grant had been fully earned by said railway company. The title thus acquired could be successfully asserted by said company, and by its grantors against the world, and if any apparent title was left, either in the United States or in the State of Iowa, it was held upon trust, and subject to the right of the company to demand and receive the patent perfecting in itself the record of the title which it had fully earned. There can be no doubt that the original patent was issued by the State and received by the railroad company, with the understanding that it covered all of the north half of section twenty-seven.

The plat of the survey showed lots one and two extending to the water's edge. The minutes of the survey located both the southeast and the northeast meander corners on the margin of the lake. The meander line is not established as a boundary, but a line drawn from point to point along the shore, disregarding its minor sinuosities, and is used, not to mark the limits of the tract of land adjacent thereto, but simply as a basis from which to measure such tract and determine the number of acres for which the government will demand payment; and, when payment

for such acreage is made, the title of the purchaser extends to the water's edge, even though in places there be small unmeasured tracts lying outside of the meander line. *St. Paul & Pac. R. R. Co. v. Schurmeir*, 74 U. S. 272 (19 L. Ed. 74); *Hardin v. Jordan*, 140 U. S. 380 (11 Sup. Ct. 808, 838, 35 L. Ed. 428); *Ex parte Davidson* (C. C.) 57 Fed. 883; *Schlosser v. Cruickshank*, 96 Iowa, 418; *Ladd v. Osborne*, 79 Iowa, 95; *Everson v. Waseca*, 44 Minn. 247 (46 N. W. 405); *St. Paul Railway Co. v. Railroad Co.*, 26 Minn. 31 (49 N. W. 304); *Held v. Yumisko*, 7 N. D. 422 (75 N. W. 806). This rule is subject to the exception that if by a mistake or fraud in the survey a meander line be run where no lake or stream calling for such expedient exists, or if it be established at such excessive distance from the actual shore as to leave between its course and the shore an excess of unsurveyed land so great as to clearly and palpably indicate fraud or mistake in the survey, then the courts will, for equitable reasons, treat the meander line as a boundary. *Mitchell v. Smale*, 140 U. S. 406 (11 Sup. Ct. 819, 840, 35 L. Ed. 442); *Grant v. Hemphill*, 92 Iowa, 218. And where such mistake has occurred, and the United States has not in any way parted with its right to the land so left unsurveyed, the proper department of the government may cause the survey to be made, and dispose of such tracts as portions of the public domain. But where the United States has parted with its title, a new survey can have no effect upon the rights of those holding under prior grants or patents. *St. Paul Railway Co. v. Schurmeier*, 74 U. S. 289 (19 L. Ed. 74); *Kirwan v. Murphy*, 109 Fed. 355 (48 C. C. A. 399); *St. Paul Railway Co. v. R. R. Co.*, 26 Minn. 31 (49 N. W. 303); *Hardin v. Jordan*, 140 U. S. 400 (11 Sup. Ct. 808, 838, 35 L. Ed. 428); *Mitchell v. Smale*, 140 U. S. 406 (11 Sup. Ct. 819, 840, 35 L. Ed. 442); *Moore v. Robbins*, 96 U. S. 530 (24 L. Ed. 848); *Kean v. Roby*, 145 Ind. 228 (42 N. E. 1011).

It follows that when the railway company has fulfilled the conditions of the grant, its right to all of that portion of the public domain within the limits of section twenty-seven became perfect, and the issuance of the later patent in 1901 vested it with no other or higher right than it would have possessed had such instrument issued in 1880. We are unable to see how the second survey gives to, or takes from, either party to this controversy any right which might not have been insisted upon with equal effect had such survey never been made. Where a grant of land to a railway company, or for other scheme of public improvement, is in the nature of a float, and covers lands not surveyed into sections, and the tracts of land upon which the grant is to operate can not be known until officially surveyed, as was the case in the *United States v. Montana Lumber Company*, 196 U. S. 573 (25 Sup. Ct. 367, 49 L. Ed. 604), the title remains in the United States until such survey has been made.

But such is not here the case. The lands had been fully surveyed, and the sections, townships, and ranges definitely located and numbered at least seven years before the grant under which all of the parties to this controversy claim. The grant is couched in words giving it immediate present efficiency, and when once enacted, no right or title to said section remained in the government, except the right to insist upon the fulfillment of the specified conditions, and to declare a forfeiture upon the failure thereof. The company having performed the conditions, it was in position to sell and give good title to the entire section, or to any part or parcel thereof. The original survey and plat, as we have seen, showed lots one and two extending to the water's edge, and disclosed no meander line independent of the shore line. The company, as proprietor of all the land, had the entire right to accept that survey as satisfactory, and sell and convey the property with ref-

2. BOUNDARIES:  
meandered  
lakes: excess  
land: title:  
estoppel.

erence thereto, and the grantee in such conveyance could successfully assert his title thereunder to all of the land indicated against all comers; nor could a later survey, made at the instance of mere strangers or intermeddlers, subvert the right so acquired. The railway company did sell and convey lots one and two with reference to the original survey and plat which then stood unquestioned. That survey, we repeat, showed the north line and south line of section twenty-seven both closing upon meander posts planted upon the shore of the lake, and the meander between them coinciding with the shore which is clearly marked as constituting the east boundary of lots one and two. It has been said by the Supreme Court of the United States that: "It may be considered a canon in American jurisprudence that where the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to another, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." *St. Clair v. Lovington*, 90 U. S. 63 (23 L. Ed. 59).

In discussing a similar question in *Railroad Co. v. Schurmeier*, *supra*, the same court, referring to the original plat, says: "In preparing the official plat from the field notes the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line as actually run on the land, is the boundary." If, therefore, the railway company confessedly owned all of the land in this half section, whether within or without the meander line, and saw fit to recognize this rule, and make sale and conveyance of lots one and two according to the only official survey then existing, no other person was authorized to object thereto, or dispute the effectiveness of such conveyance to carry title to all of the lands to the water's edge, and most

certainly the grantor is in no position to raise such a question. This conveyance of the land according to the original survey was an adoption of that survey for the purposes of such transaction. So far as the record in this case is concerned there is not the slightest evidence that that railway company supposed that it was reserving or retaining the title to any part of this land bordering upon the lake shore. There is nothing whatever to show that it was not fully aware of the alleged discrepancy between the original survey and the actual area, or that it was in any manner misled or deceived as to the true situation. There is nothing to show that from thence to this date it has ever asserted the existence of any such mistake, or sought its correction or a resurvey of the land. The attack upon the original survey and the demand for another were made by parties having no right, actual, apparent, or prospective, in the premises. So far as is shown by the evidence the attitude of the railway company with respect to that proceeding was purely receptive. It was making no claim for itself, but if these strangers were willing to shake the tree, it was not averse to appropriating any fruit which might fall in its lap. Its subsequent quitclaim to the appellee implies no assertion or affirmation of title in itself, nor does it necessarily indicate any attempt on its part to create or vest a title in appellee. Its only effect is to place the grantee in the shoes of the grantor, and if the latter had no title, legal or equitable, the deed conveys none. The stream can not rise higher than its source. Let us therefore inquire whether the railway company would be barred or estopped from making this claim of title against the appellants.

This inquiry we are constrained to answer in the affirmative upon at least two grounds: First, the legal effect of the conveyance by the railway company to the land company in 1884; and, second, the adverse possession of the premises in controversy by the appellants and their

grantors. The first of these propositions we have already treated at considerable length, and need only to add, by way of recapitulation: When this conveyance was made the original survey of the land with its plat and records had for nearly thirty years stood unchallenged. Both record and plat show lots one and two bounded upon the lake shore. This fact might perhaps have been of no binding significance as against a claim by the United States had the government not divested itself of title to the entire section, but as against the railway company which held title, legal and equitable, to all of the land, it is of decisive importance. The mistake, if one had been made, was as evident in 1884 as it was sixteen years later, when the call for a resurvey was made by a stranger. Without reservation or explanation said company, holding, as we have said, an indefeasible title to all of the land, saw fit to sell and convey these lots according to the original survey. For near twice the period of the statute of limitations it stood by and saw its successive grantees under said conveyance occupy all of the land up to the lake shore, claiming and using it as their own without protest or objection or any assertion or act of ownership upon its part, thus putting a practical construction upon its own deed, which is of the utmost significance. The most that can be said of this transaction is that the lots so conveyed may have contained more acres than the company supposed, and that the price received was less than it would have demanded had it been advised of the true acreage, though there is no testimony to this effect in the record, but such mistake, if any, does not affect the title conveyed.

It may be freely admitted that as between the government and the patentee or grantee of any portion of the public domain any mistake in the survey of the granted tract may be corrected in a proper proceeding for that purpose, if the effect thereof is to restore to the public do-

3. SAME:  
resurvey of  
patented land:  
jurisdiction.

main lands of which the government might otherwise be wrongfully deprived, and the genesis of the present controversy is doubtless in the mistaken notion that this rule is applicable as between the railway company and its grantees under the conveyance of 1884. But the rule thus conceded is not better established than is the other rule that where the government has parted with its title, and the controversy is wholly between persons asserting conflicting claims under grants or patents based upon the official survey, such survey is conclusive, even though as an engineering proposition it be grossly incorrect, and the land department has no more authority or jurisdiction to affect the rights of any party to such controversy, by directing a new survey or the issuance of a new patent, than it has to take cognizance of a boundary line dispute between adjacent farm owners who disagree as to the true location of a section line.

An instructive leading case upon this perhaps is *Cragin v. Powell*, 128 U. S. 691 (9 Sup. Ct. 203, 32 L. Ed. 566). There certain lands had been patented in

part to individual purchasers, and in part to the State as swamp lands. A dispute arising between grantees of these titles, and

action being brought in the said court to determine it, it was transferred to the federal court, which attempted to locate the lands by a new survey. On appeal it was sought to justify this judgment on the ground of the absence of any definite monument or date by which to ascertain the original line, except references in the original record to certain bayous and streams, and that the original survey was in general imperfect and incorrect. Overruling this proposition, and reversing the judgment of the trial court, it is said to be "a well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all of its notes, lines, descriptions and landmarks becomes a part of the grant or



deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out on the face of the deed or grant itself." Applying this rule to the case at bar, and assuming that the deed from the railway company to the land company and each successive deed in that line of title had described the land as "northwest quarter, and lots one and two in section twenty-seven, township ninety-seven, range thirty-five, being the land described in the official report of the government survey as follows, to wit [setting out in full the surveyor's note and plat, showing both the north and south lines closing on the lake and the eastern boundary coincident with the shore line]"—can there be any reasonable doubt that if the grantors in such deed owned all of the land up to the shore, it would all pass by such deed to its grantee? There can be no reasonable doubt that such would be its effect, and if for any reason the grantor did not have title to any part of the land so conveyed, and it subsequently acquired title, it would insure to the grantee's benefit. That the original survey, even though incorrect, is conclusive between individual buyers and sellers who deal with it on the basis of such survey. See *Stoneroad v. Stoneroad*, 158 U. S. 240 (15 Sup. Ct. 822, 39 L. Ed. 966); *Russell v. Maxwell*, 158 U. S. 253 (15 Sup. Ct. 827, 39 L. Ed. 971); *Horne v. Smith*, 159 U. S. 40 (15 Sup. Ct. 988, 40 L. Ed. 68); *Ufford v. Wilkins*, 33 Iowa, 110; *Kraut v. Crawford*, 18 Iowa, 549.

True the location of lines and corners as established by the official survey, when the subject of dispute, may be determined as other questions of fact, but when any given, fixed monument or natural object named in the survey is found, it must be respected, even though its location be out of harmony with the recorded measurements. "It is a universal rule that course and distance yield to natural and ascertained objects. A call

5. CONVEYANCES:  
description:  
natural ob-  
jects: course  
and distance.

for a natural object, as a river, a spring, or even a marked line, will control both course and distance." *St. Clair v. Lovington*, 90 U. S. 46 (23 L. Ed. 59). See, also, *Brown v. Milliman*, 119 Mich. 606 (78 N. W. 785). The last cited case is very much like the one before us in some of its essential features. There according to the government survey a meander post was set upon the shore of the lake. Later in attempting to trace this line the surveyor, following the minutes of course and distance as noted in the record of the original survey, located the meander corner seventeen chains west of the shore, but the court, recognizing the rule just quoted, held that the official survey was conclusive, and that the lake shore must be recognized as a monument fixing the boundary in that direction. To the same effect Judge Cooley says: "Where definite and permanent boundaries are given, the deed must be held to convey all land within those boundaries, notwithstanding the quantity is much greater than that mentioned." This is on the familiar principle that the incorrect portion of the description is to be rejected where that which remains is sufficient, and that definite and permanent monuments are to control distance and quantity. *Gilman v. Riopelle*, 18 Mich. 145. In the instant case the location of the first meander corner is designated as being at the intersection of the south line of the intersection of the lake, a fixed natural monument which can not be rejected in any controversy growing out of a conveyance of land according to the survey which it thus witnesses. Indeed, conceding, as the evidence tends to show, that the location of both the southwest and northwest corners of the section have been definitely located, and that the lake still extends along the eastern border substantially as it did in 1856, we have every monument called for by the original survey, and the only discrepancy between this showing and the one made by the later survey is in the

length of the south line of the fractional section, and the difference thus resulting in the superficial area of the land included within the lines thus traced. We regard it clear that the railway company can not be heard to say that its conveyance of said lands according to the original survey was ineffective to vest in its grantee title to all of the land within the boundaries thereby established. This result is in no manner inconsistent with the rule laid down in *Grant v. Hemphill*, 92 Iowa, 218, and *Schlosser v. Hemphill*, 118 Iowa, 452. In each of those cases it was affirmatively established that no lake or body of water existed at the time of the survey justifying the use of a meander line, and as the natural monument on which the section lines were supposed to close had no existence, it followed of necessity that the so-called meander line must be treated as a boundary. But in this case there was a lake with a permanent well-defined shore line, and the precedents referred to have no application. The case comes rather within the rule of *Ladd v. Osborne*, 79 Iowa, 93, and *Schlosser v. Cruickshank*, 96 Iowa, 414.

Having found for the defendants upon the decisive propositions hereinbefore discussed, we do not think it necessary to determine the issue of adverse possession. For the reasons we have stated the decree quieting title in the plaintiff is erroneous, and the same is reversed. The appellee, if he so elects, will have a decree in this court confirming his title, otherwise the cause will be remanded to the district court for decree in harmony with this opinion.—*Reversed*.

MCCLAIN, J., dissenting.—The meander line of the first survey so far departed from the actual shore line as it was at the date of such survey that within section 27 more than one hundred acres of land were left between them unsurveyed, and not taken into account in computing the areas of the adjoining lots for purposes of sale; and

defendants, as owners of lots one and two in the fractional northeast quarter of that section, claim a tract of land between the meander line and the shore line larger than either of those lots. Now, while the case of *Schlosser v. Hemphill*, 118 Iowa, 452, may not be necessarily controlling because of the difference in the facts involved between that case and this, I should prefer to adopt, as applicable to this case, the language of that opinion, and say: "We are further inclined to believe that when the meander line deviates from the true shore, as it does in this case from the bank of the body of water attempted to be bounded according to all the evidence and the concessions of counsel, the error would be so gross as to warrant a resurvey." The railroad company did not purport to convey to defendants' grantor any other land than that described in its deed, and if the meander line constituted, as I think it unquestionably did, under a reasonable interpretation of the decision in the case referred to, a boundary line, then the grant by the railroad company should be limited to the lots described in accordance with the original survey. In my opinion it is wholly immaterial that the railroad company was already entitled, at the time its deed to defendants' grantor was made, to any unsurveyed portion of the northeast quarter of the section. It might grant that portion which was surveyed, or any part thereof, and retain its right to the balance. When the subsequent survey was made, it was found that the railroad company was titled to further land in that quarter section, and in my opinion this land, between the meander line and the actual shore line, remained the property of the railroad company until granted to the plaintiff.

Under this state of facts I am unable to concur with the conclusion of the majority that the conveyance by the railroad company to the defendants' grantor of lots one and two carried with it the unsurveyed land between the

meander line and the shore line, a tract which, according to the second and correct survey is of the extent of more than forty-four acres, and I, therefore, dissent from the views expressed in the majority opinion.

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WILLIAM STONE, Appellee, v. ELIZA STONE, MINNIE BROWN and S. M. BROWN, ELNORA CLARK and C. L. CLARK, ETTA SUITER and P. M. SUITER, CLIFFORD STONE and ———— STONE, his wife, and BARTON STONE and IDA STONE, Appellants.

**Deeds: RESERVATION: EXCEPTION: DISTINCTION.** A reservation in a deed of conveyance is the creation of a new right issuing out of the thing granted in favor of the grantor only, which did not exist as an independent right before the grant, and in the absence of words of inheritance continues only for the life of the grantor; while an exception is a clause withdrawing from the conveyance some part of the thing granted which otherwise would have passed to the grantee.

**Same.** A deed conveying in trust the entire estate in lands, except certain designated timber, which was reserved for the use and benefit of a third person, is held to be an exception of the timber from the grant rather than a reservation of part of the estate granted, and that the entire estate in the land passed to the trustee.

*Appeal from Scott District Court.*—HON. J. W. BOLLINGER, Judge.

SATURDAY, FEBRUARY 20, 1909.

SUIT in equity to establish and quiet plaintiff's title to certain real estate in Scott County, Iowa. The trial court granted the relief prayed in plaintiff's petition, and defendants appeal.—*Affirmed.*

W. M. Chamberlin and Walter H. Peterson, for appellants.

*J. A. Hanley*, for appellee.

DEEMER, J.—Both plaintiff and defendants claim title under a deed made by Henry Stone, Sr., and his wife, Betsey, to Ruth Stone, on or about April 9, 1870, the material parts of which read as follows:

Witnesseth: That whereas the said Henry Stone, Sr., is desirous to make provision for his daughter-in-law, the aforesaid Ruth Stone, and for her children hereinafter to be named, against future contingencies and hers and their support, and whereas the aforesaid Henry Stone, Sr., is desirous that his said daughter-in-law and her children should enjoy the proceeds, rents, issues, and income of the real estate hereinafter more particularly described for the full term of her natural life, free from the control, liabilities, or interferences of any husband that she may hereafter have: Now, therefore, this indenture, witnesseth: That the said Henry Stone, Sr., in consideration of the sum of one dollar to him in hand paid by the said second party, the receipt whereof is hereby acknowledged, has bargained and sold, and does by these presents grant, bargain, sell, convey and confirm unto the said second party, the following described real estate lying and being situated in the county of Scott, and State of Iowa, to wit: The west half ( $\frac{1}{2}$ ) of the northwest quarter of section No. five (5), township No. seventy-eight (78) North, of range five (5) East, of the 5th P. M., excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section, the land upon which said timber is situated more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as the Condid Creek, thence in an easterly direction following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge, thence in a southerly direction on and along said Slough Road to the south line of said premises, thence west to the place of beginning, supposed to contain fifteen (15) acres. Said timber reserve is made for the express use, benefit, and behoof of Henry Stone, Jr., son of Henry Stone, Sr., also

the east half ( $\frac{1}{2}$ ) of the west half ( $\frac{1}{2}$ ) of the southwest quarter of section No. five (5), in township No. seventy-eight (78) North, of range five (5) East, of the 5th P. M., containing forty acres (40), more or less. The intention being to convey hereby absolute title in fee simple to said real estate, to have and to hold the premises herein described in trust for the uses and purposes hereinafter specified. First. To use for the maintenance of herself and for the maintenance, education and support of her minor children the aforescribed trust for the full term of her natural life, she to pay from the proceeds, products, and use of said trust all taxes that may hereafter be justly assessed against said premises. Second. To leave the premises at her death in as good condition as reasonable use thereof will permit to her two sons named William Stone and Henry Stone. Third. The said Henry Stone, Sr., and Betsy Stone, his wife, hereby declare that upon the decease of the aforesaid Ruth Stone, the aforesaid trust shall cease and determine, and the foregoing described premises shall belong in fee simple to William Stone and Henry Stone, sons of the said Ruth Stone, upon the express condition that the aforesaid William Stone and Henry Stone pay or cause to be paid to their three sisters the following sums, to wit: To their sister Harriet the sum of one hundred dollars (\$100), to their sister Mary the sum of one hundred dollars (\$100), to their sister Ida the sum of one hundred dollars (\$100), said sums to be paid at the time of their taking possession of said premises, and the said party of the second part doth hereby signify her acceptance of this trust, and doth hereby covenant and agree to and with the said parties of the first part faithfully to discharge and execute the same to the true intent and meaning of these presents. In witness whereof, we have hereunto set our hands and seals, this 10th day of May, A. D. 1870.

Thereafter, and in the year 1901, Harriet Dickinson and her husband and Mary Shanor and her husband, Ida Waterbury and her husband, and H. H. Stone and his wife conveyed their respective interests in the lands described in the initial deed quoted to plaintiff, William Stone. The three main grantors in these several deeds

are brother and sisters of the plaintiff. Henry Stone, Sr., the grantor in the first deed quoted, was the father of Henry Stone, Jr., and the grandfather of plaintiff. Plaintiff's mother, Ruth Stone, was the widow of Miron Stone, who was a son of Henry Stone, Sr. Ruth Stone died in the year 1901, and Henry Stone, who was the husband of the defendant Eliza Stone and the father of the other defendants, died prior to the time of the death of Ruth. Ruth Stone held a life estate in the property in controversy, and, with plaintiff, has been in the possession of the property since the time of making the original deed in May, 1870. Plaintiff has paid each of his three sisters the \$100 provided for them in the deed hitherto set out, and has received the deeds mentioned, and he, plaintiff, has also purchased an undivided one-half of his brother Henry's (or H. H. S.'s) interest. Unquestionably, then, plaintiff owns the fee title in said premises, unless it be found that defendants have some interest in virtue of the exception or reservation clause of the original deed, which reads in this wise:

Excepting a certain lot of timber growing and standing in the southwest corner of the aforescribed quarter section; the land upon which said timber is situated, more fully described as follows, to wit: Commencing at the southwest corner of said premises, running thence north to a certain creek known as Condid Creek; thence in an easterly direction, following the meanderings of said creek to the first bridge across said creek, known as the Old Slough Road Bridge; thence in a southerly direction on and along said slough road to the south line of said premises; thence west to the place of beginning, supposed to contain 15 acres. Said timber reserve is made for the express use and benefit and behoof of Henry Stone, Jr., son of Henry Stone, Sr.

Upon this defendants base their claim to one hundred and twenty acres of the land. The argument is that the



original deed conveyed a fee to Henry Stone, Jr., and that the clause in the deed referring to Henry Stone, Jr., creates an exception, and conveys the lands therein mentioned to Henry Stone, Jr. To properly solve this question, we must have in mind the distinction between reservations, exceptions and grants. The nature of a grant is pretty well understood. But a grant may be of any kind of an estate which is the subject of transfer. A reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. And an exception is a clause in a deed which withdraws from its operation some part of the thing granted which would otherwise have passed to the grantee under the general description. *Blackman v. Striker*, 142 N. Y. 555 (37 N. E. 484); *Biles v. Tacoma Co.*, 5 Wash. 509 (32 Pac. 211); *Eiseley v. Spooner*, 23 Neb. 470 (36 N. W. 659, 8 Am. St. Rep. 128); *Herbert v. Pue*, 72 Md. 307 (20 Atl. 182). Sometimes the terms are used indiscriminately, and what is described in the conveyance as an exception is oftentimes held to be a reservation. *Wellman v. Churchill*, 92 Me. 193 (42 Atl. 352). A reservation is never of a part of the estate itself, but is something taken back out of that already granted, as rent, or the right to cut timber, or to do something in relation to the estate, while an exception is of some part of the estate not granted at all. *Youngerman v. Polk County*, 110 Iowa, 731. A reservation is always in favor of the grantor, and, if it does not contain words of inheritance, it exists only for the life of the grantor. *Engel v. Ayer*, 85 Me. 448 (27 Atl. 352). A reservation must be in favor of the grantor or party executing the conveyance, and not to a stranger. *Karmuller v. Krotz*, 18 Iowa, 352.

With these rules in mind, we now go to the deed which lies at the basis of this controversy, and are forced to con-

clude from an examination thereof that there was an exception rather than a reservation in the deed,

2. SAME.

and that this exception was of a certain lot of timber rather than the land itself, and that such reservation was for the benefit of Henry Stone, Jr., personally, and terminated with his death. This exception was not of an estate in the land or any part thereof, but, if it were, it is of a life estate only which terminated with the death of Henry Stone. There can be no doubt that the entire estate in the lands described was conveyed in trust to the grantees named, but that a certain amount of timber was excepted from the grant. This exception was for the personal benefit of Henry Stone, Jr., and would terminate by his death. Henry Stone, Jr., has conveyed all his right, title, and interest in and to the property to the plaintiff, and we do not think that defendants have any interest therein. If any they have, it is upon the theory that something remained in the grantor, Henry Stone, Sr., after his conveyance in April of the year 1870 which passed by descent to his heirs. As already observed, we do not think that anything remained in him, but that the title passed by the deed save and except the timber growing upon a certain part of the premises which was excepted from the grant, and the use thereof given to Henry Stone, Jr., who has since conveyed all his right, title and interest to plaintiff herein.

The trial court correctly established plaintiff's title, and quieted it against all of the defendants; and its decree must be, and it is, *affirmed*.

DELIA E. JOHNSTON, Appellant, v. GEORGE B. JICKLING  
ET AL., Appellees.

DELIA E. JOHNSTON, Appellant, v. HENRY HOERAS ET AL.,  
Appellees.

**Trusts: STATUTES: EVIDENCE.** Both the statute of frauds and Code  
1 section 2918, requiring that declarations of trust must be executed as deeds of conveyance, relate to the character of evidence and do not declare a parol trust in lands invalid; so that where the trustee admits the trust, or where a parol trust has been fully executed, they have no application.

**Dower: ACTION TO ESTABLISH SAME: BENEFICIAL INTEREST OF HUSBAND: EVIDENCE.** In an action by the widow to establish her dower  
2 interest in lands conveyed by her husband alone, it is competent to show by parol that the husband had no beneficial interest in the property, and that he simply reconveyed the same to his grantor or some one designated by him; and the act of the husband in reconveying under such circumstances is not a fraud upon the wife which she can urge in support of her claim of a dower interest in the property. Evidence held to show that the husband never had any real interest in the land and that the same was not subject to the wife's dower.

*Appeal from Madison District Court.*—HON. EDMUND  
NICHOLS, Judge.

SATURDAY, FEBRUARY 20, 1909.

SUIT in equity to establish, set aside and quiet in plaintiff her title to one-third of certain lands described in the petitions. Plaintiff bases her claim upon the fact that she is the widow of J. H. Johnston, deceased, who died December 27, 1904, that Johnston at one time owned the lands in controversy, and that she, plaintiff, never relinquished her dower interest therein. Various issues were

tendered by defendants to some of which we shall refer during the course of the opinion; and upon trial to the court a decree was entered dismissing plaintiff's petition in each case. Plaintiff appeals.—*Affirmed*.

*McLaughlin & Shankland* and *Thos. A. Cheshire*, for appellant.

*John A. Guher, Wilkinson, Smith & Wilkinson, Robbins & Wilkie, Robert B. Meloy* and *H. L. Wallace*, for appellees.

DEEMER, J.—J. H. Johnston, now deceased and some time plaintiff's husband, held the legal title to the land in controversy. He individually conveyed these lands to the defendants herein or their grantors; his wife not joining in the conveyances either to release her dower or otherwise. J. H. Johnston died December 27, 1904, leaving plaintiff and a daughter Winnie surviving. Plaintiff claims that, as his widow, she is entitled to one-third of the lands of which he was possessed, and to which she had made no relinquishment of her dower. If the facts above recited were all there is of the case, it is manifest that plaintiff would be entitled to a decree substantially as prayed; but defendants say that J. H. Johnston never had any beneficial interest in these lands, that he held the title in trust for one Simpson and in performance of that trust conveyed the title thereto as directed, and that his wife never had any interest in or to said lands. It is further claimed, and the testimony shows, that Johnston obtained a divorce from the plaintiff under the name of Dell Johnston in the district court of Washington County, Neb., on the 19th day of September, 1889, upon service by publication. This divorce was obtained before he, J. H. Johnston, obtained title to the lands in controversy. While the divorce suit was pending J. H. Johnston conveyed certain

property in Monroe, Iowa, to plaintiff, and she has since conveyed that to others by warranty deed; John H. Johnston not joining therein. In November of the year 1894 J. H. Johnston married one Mrs. Culbertson, and this marriage was made public. Johnston obtained a divorce from this second wife, and thereafter married Mamie Larkins, and the fact of this third marriage was made known to various parties in Jasper County, Iowa. Plaintiff has always lived in Jasper County. By her first husband she had one child, Winnie, who was married at Prairie City, Iowa, plaintiff's home, in the year 1891, to one Rule. It is also claimed that there was a sale of the lands in controversy at sheriff's sale, which finally ripened into a deed, and that this barred plaintiff of any interest in the property.

It will be observed that on the face of what may be called the record title plaintiff is entitled to the relief demanded because she was the wife of Johnston, and has never signed away her inchoate right of dower. On the other hand, a decree of divorce appears in the record which in itself deprived plaintiff of all right in and to the property, and the burden is upon her to get rid of this decree in order to establish any right or title to the lands or any part thereof. The burden is upon the defendants to show that Johnston held the lands in trust, and on plaintiff to show that the divorce referred to is invalid. By reason of the subsequent marriages of Johnston there is also a presumption of divorce which counts in defendant's favor. For reasons which will presently appear, the judicial or execution sale cuts no figure in the case. With reference to the divorce granted in Nebraska, it is contended that the court which passed the decree had no jurisdiction, for the reason that neither party was a resident of that State, that the decree was and is invalid, and that Johnston, while a resident of Iowa, became and was adjudged insane, and could not thereafter change his resi-

dence or domicile nor enter into a valid trust agreement such as is claimed with reference to the lands in controversy. Many defects are also pointed out in the divorce proceedings which are claimed to be fatal to the decree.

With the issues in mind and the burden of proof as to the various matters stated, we now go to the evidence, and from this gather the following facts: Plaintiff was married to John H. Johnston at Knoxville, Iowa, on December 31, 1868, and soon thereafter they took up their residence at Red Rock, in this State. Thereafter they lived for a time at Walnut, Iowa, and still later moved to Jasper County, Iowa, where the husband engaged in the live stock business. It is claimed by plaintiff that he continued to live in Jasper County until his death, December 27, 1904, although it is admitted that he was in many western States, and made trips both to England and to South Africa while engaged in the live stock business. It is also admitted that about the year 1880 he made his headquarters at Blair, Neb., and that in the year 1886 he became temporarily insane, was brought to Jasper County, and there adjudged insane and committed to the hospital at Mt. Pleasant, where he remained for about six months, when he escaped and returned to Blair, Neb., which place he made headquarters until about September, 1889. When he went to Blair, he soon began living with a woman named Fannie Whitted at hotels and in rented apartments. On July 31, 1889, Johnston brought suit for divorce in the district court of Washington County, Neb., against "Dell Johnston," who it is claimed was well known to be plaintiff, in which he alleged that defendant had been guilty of desertion for the period of more than three years. Notice directed to "Dell Johnston" was printed in a newspaper published in Washington County, Neb., for the requisite time, and no one appearing, default was entered, and on September 19, 1889, a decree was passed granting plaintiff therein a decree of divorce. From the time of his

marriage down to the date of his divorce, Johnston frequently visited plaintiff and his children, and contributed to their support. From about the year 1882 and down to September 19, 1889, he wrote many affectionate letters to plaintiff as his wife, and upon the very day upon which the divorce was granted he wrote a letter in which he addressed her as such. After the decree was granted, he wrote letters to plaintiff, but addressed her as Dell or as Mrs. Dell Johnston.

On March 3, 1894, one Thomas Simpson conveyed the premises in controversy by warranty deed to John H. Johnston; he, Simpson, at that time being the owner of the land. At that time Simpson was a married man, but his wife did not join with him in the deed. On May 24 of the same year Johnston conveyed the land by warranty deed to Lee & Benedict; the deed indicating on its face that at that time he, Johnston, was a single man. On June 14, 1894, Helen Simpson, wife of Thomas Simpson, executed a quitclaim for the lands in controversy to Lee & Benedict. On the day that Johnston received the conveyance of the land, he executed a mortgage thereon for the sum of \$2,000 to J. M. Simpson, and on the 23d day of May, 1894, he executed a second mortgage for the sum of \$600 to James M. Simpson. On the 28th day of March, 1894, he executed a mortgage in the sum of \$400 to Samuel W. Simpson. Thomas Simpson had married one Nellie Dennison on September 21, 1891, and she was thereafter known as Helen Simpson. On July 11, 1892, she brought action against her husband in the district court of Madison County for separate maintenance, and asked for temporary alimony. The latter she was awarded, and, upon appeal, this award was confirmed; the opinion having been filed May 19, 1894. See 91 Iowa, 235. By antenuptial contract between Thomas and Helen Simpson, it was provided that the wife was to have no interest in her husband's property after his death. On November 12, 1894, Fannie

Whitted, or Fannie Whitted Culbertson, with whom J. H. Johnston had been living since about the year 1881, secured a license from the county clerk of Cook County, Ill., to marry Johnston and on the 13th of that month they entered into a ceremonial marriage in the city of Chicago. In the year 1878 one Barton and husband conveyed to plaintiff, under the name "Dell E. Johnston," certain property in Monroe, Iowa, in which she resided for many years, and in August of the year 1889 Johnston executed a deed to Dell E. Johnston conveying all his interest in the Monroe property, and again, on February 6, John H. Johnston executed to one Hummel a quitclaim deed for the Monroe property. It is claimed that Thomas Simpson made the deeds of the land in controversy to John H. Johnston because he had confidence in him, Johnston, and believed he, Johnston, could settle the difficulties which he, Simpson, was then having with his wife better than any one else; that the land was deeded to Johnston for the purpose of effectuating such a settlement; and that when the settlement was made the land was to be deeded back to Simpson, or to some one designated by him. Testimony was adduced to the effect that no consideration was paid for the conveyance, that Johnston took simply the naked legal title for the purposes named, and that he was to have compensation for the services rendered by him. Lee & Benedict, to whom Johnston made the conveyance, were his (Johnston's) employers, and, as will presently be seen, they followed out his directions in placing the title. Johnston succeeded in settling with Helen Simpson, agreeing to give her \$2,500, and Lee & Benedict made a mortgage upon the land to Mrs. Simpson for that amount; there being some agreements as to priorities with the previous mortgagees. On May 26, 1894, two creditors brought actions against John H. Johnston, and levied upon the land in controversy. On January 29, 1895, Lee & Benedict conveyed the property to Samuel W. Simpson, subject



to mortgages amounting to \$3,000, which the grantee agreed to pay, and at the same time he, Simpson, executed a mortgage to one Murray for the sum of \$3,000 in order to settle his matters with Helen Simpson. This \$3,000 was made a first mortgage upon the land, and a second one was issued to J. H. Johnston for \$2,000; and a third for \$1,800 was made to James W. Simpson. The \$3,000 mortgage was foreclosed, Johnston being made a party, and the land sold and a sheriff's deed subsequently executed. Defendants trace their title through this foreclosure, sale, and deed. J. H. Johnston obtained a divorce from his second wife, Fannie Whitted Culbertson, and thereafter, as has already been stated, he married one Mamie A. Larkins, who resided in Jasper County, Iowa, and whom he thereafter introduced as his wife. His last marriage occurred some time in the year 1902 or 1903. The ultimate facts above recited are practically conceded, although different inferences are sought to be deduced therefrom by the respective parties. It is conceded that there is no dower in a trust estate, and such is the undoubted rule. *Langworthy v. Heeb*, 46 Iowa, 64; *McDaniel v. Large*, 55 Iowa, 312.

But it is argued that the trust, if there was one, in J. H. Johnston for his grantor Simpson, was an express one, resting in parol, and that it can not be proved in this proceeding for the reason that the statute

1. Trusts: statutes: evidence. (Code, section 2918) provides that such trusts must be in writing, and can not be established by parol testimony. Further, it is argued that the conveyance from Simpson to Johnston was made with intent to defraud his (Simpson's) wife, and was fraudulent and void, although legal and valid as to every one save Mrs. Simpson. It is true, of course, that, generally speaking, an express trust can not rest in parol, and that a fraudulent conveyance is good as between the parties thereto; but it is just as well settled that neither the stat-

ute referred to nor the statute of frauds declares a parol trust invalid. These statutes have reference to the character of the evidence which must be adduced as against the holder of the legal title. If the trustee admits the trust or if the parol trust has been fully carried out and executed, the statute does not apply. *Westheimer v. Peacock*, 2 Iowa, 528; *Merchant v. O'Rourke*, 111 Iowa, 351; *Karr v. Washburn*, 56 Wis. 303 (14 N. W. 189); *Eaton v. Eaton*, 35 N. J. Law, 290; *Hays v. Reger*, 102 Ind. 524 (1 N. E. 386); *Bork v. Martin*, 132 N. Y. 280 (30 N. E. 584, 28 Am. St. Rep. 570); *McCormick v. Griffin*, 116 Iowa, 397; *Atkinson v. Hancock*, 67 Iowa, 452; *King v. Bushnell*, 121 Ill. 656 (13 N. E. 245); *Cresswell v. McCaigg*, 11 Neb. 222 (9 N. W. 52).

Again, it is argued that, conceding these rules, the testimony shows that Simpson made the conveyance to Johnston to defraud his (Simpson's) wife, and that no court should allow parties who claim under

2. DOWER: action to establish same: beneficial interest of husband: evidence.

a conveyance made by a fraudulent grantee to establish that fact. If Simpson's wife were the party complaining of the conveyance, this would doubtless be true. But the action before us is brought by the wife of the so-called fraudulent grantee who has reconveyed the land to his grantor, or to another by his direction; and defendants are not bound to prove the fraud in order to establish their defense. All that they need show is that Johnston never had any beneficial interest in the property. They do not have to rely upon the alleged fraud in order to defeat plaintiff's action. It was perfectly competent for them to show by parol that Johnston never had any beneficial interest in the property, and that he reconveyed the property to his grantor or to some one designated by him. Johnston's wife was not in privity to him in the matter of this conveyance; and, while as between the parties a fraudulent conveyance is good and can not be set aside except at the

suit of creditors, the parties themselves may by reconveyance purge the transaction of the fraud, and, unless one be in privity to the conveyance, he can not complain. Johnston recognized that he never held any beneficial interest in the property, and in making the reconveyance he did not defraud his wife. See cases cited in 10 Am. & Eng. Ency. of Law, 142. In answer to this it is contended that Johnston was adjudged insane in March of the year 1886, and was committed to the hospital for the insane; that his insanity once shown is presumed to have continued; and that, while he might as an insane person take title to land, he could not convey it to another. Of course, if the title passed to Johnston while insane, and he never recovered sanity, it may be that his conveyances thereafter might be treated as voidable. But to appellant's contentions there are several answers. In the first place, it is shown that Johnston's insanity was temporary, and that after his escape from the asylum he recovered his faculties, and continued to do business down to the time of his death. Again, it is not shown that his grantees had any notice or knowledge of his insanity, or that any one in privity to the conveyances made by him are challenging the title. We are abundantly satisfied that J. H. Johnston never had any beneficial interest, in and to the land in controversy, and that plaintiff, if she be his widow, is not entitled to any interest therein.

III. This finding is sufficient to dispose of the case, and we need not consider the other propositions involved. It may not be out of place to say, however, that we think the Nebraska court had jurisdiction to decree the divorce which was granted J. H. Johnston, and that this decree is valid and binding and estops plaintiff from claiming anything as his widow. This finding is also aided by the subsequent conduct of both J. H. Johnston and plaintiff herein. Johnston was twice married after obtaining the Nebraska divorce. This plaintiff knew, for

he brought both his second and third wife into the community where plaintiff resided, and introduced each as his wife. Plaintiff did nothing with reference to the land or with reference to her former husband's conduct with these women.

On the entire record we are satisfied that the decree of the trial court is correct, and it is therefore *affirmed*.

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GEORGE E. WESCOTT, Appellee, v. THE CITY OF SIOUX CITY, Appellant, and THE LIBRARY & BUILDING ASSOCIATION OF SIOUX CITY, IOWA, Defendant.

**Appeal: SERVICE OF NOTICE: NECESSARY PARTIES.** In an action by a  
1 judgment creditor to set aside a deed as void for want of consideration, or as being in fraud of creditors, and to subject the property to the satisfaction of his judgment, the grantor while a proper party is not a necessary party to an appeal, and failure to serve him with notice will not deprive the appellate court of jurisdiction.

**Fraudulent conveyances: CREDITORS' SUIT.** A city in exercising its  
2 option to repurchase land conveyed to a corporation for the purpose of erecting and maintaining a public library, becomes a purchaser as to the amount paid in excess of its claims against the corporation, and not a mere creditor; and where it knew or had reason to believe that the corporation was seeking to hinder and delay other creditors in making the conveyance, it took the property in excess of its claims as trustee and subject to the demands of the other creditors. In the instant case it is held that the city knew of the plaintiff's judgment against the corporation and that its officers had either actual or constructive knowledge of the purpose to defraud.

*Appeal from Woodbury District Court.*—HON. JOHN H. OLIVER, Judge.

SATURDAY, FEBRUARY 20, 1909.

CREDITORS' bill to subject certain property, now in

the name of the defendant city, to the payment of a judgment held by plaintiff against the Library & Building Association. The trial court granted the relief asked, and the defendant the city of Sioux City appeals.—*Affirmed*.

*Fred W. Sargent* and *J. N. Weaver*, for appellant.

*T. F. Bevington*, for appellee.

DEEMER, J.—Originally the property in controversy was owned by the city of Sioux City, but title was held by certain trustees. On account of its indebtedness the city was not able to construct a library building thereon, and the defendant the Library & Building Association was organized and created under the laws of the State for the purpose of forming and maintaining a library, reading room, and museum for the city, and the erection of a building for the use of such library and for the support and maintenance of the same. This latter corporation was not one for pecuniary profit, and was created on or about October 16, 1890. In February of the year 1891 the city passed a long ordinance, in which it was recited that it (the city) could not erect a library building, but that it would be erected by a private corporation upon its own credit, and then purchased by the city and paid for in installments out of the library tax, and that offices could thereby be procured for the city and the use thereof paid for out of the general funds of the city, and a grant was made by said ordinance to the library association of authority to erect and maintain a library for the use of the inhabitants, the city to cause the land in question to be conveyed to the library association upon the agreed consideration of \$30,000, to be accounted for as payment of that amount of the purchase price upon repurchase by the city. Conveyance was accordingly made of the property to the Library & Building Association. It was also provided

in the ordinance that the library association should within eighteen months construct a suitable library building upon the property described, the cost of which should not exceed the sum of \$150,000. It was also provided that the library association might issue mortgage bonds upon the property to an amount not exceeding \$80,000, payable at the option of the association, or the owners of the ground, within ten years from date, the bonds to be a lien upon the building and grounds prior and superior to any claim of the city or its library fund for the repurchase of the property. It was also provided that the interest and a part of the principal of the bonds should be paid out of the library tax as a preferred claim. The city also obligated itself to levy a library tax for a sum sufficient to pay the interest on the bonds or notes, to pay \$5,000 annually of the principal of said bonds and the necessary expenses of operating the library. It was also provided that when the building should have been completed, the association should lease certain rooms therein to the city, the rentals thereof being fixed by the ordinance. This lease was to run for ten years, and the rentals were to be paid quarterly. Provision was made as to how these rentals should be used by the association; but, as this is not regarded as material, we shall not set it forth. Provision was also made for the purchase of the ground and building by the city upon giving thirty day's written notice, the exact language of the ordinance reading as follows:

Whenever the said city of Sioux City shall desire to purchase the said ground and building for said library funds upon one month's previous notice in writing to said company, it shall have the right to take possession of, own and control the same upon payment to said company in full for the same the actual cost of the same, after deducting the outstanding mortgage bonds, the payments thereon theretofore made, and shall also pay eight percent interest on such net unpaid balance, and all unpaid and legitimate

operating expenses connected with the management of said building by said company, and the floating or unbonded debt of said company, lawfully incurred in and about said business, and no more, and for the purpose of verifying such cost or expenses the city shall have access to all the books, contracts, vouchers, records and papers belonging to said company, and upon such payment said company shall surrender, convey and transfer to said city for said library fund, said grounds and buildings, furniture and fixtures therein, subject to any outstanding mortgage or other liens thereon.

The ordinance concludes as follows:

Sec. 12. It is the intention of this ordinance that a building shall be provided that shall furnish a suitable place for keeping the public city library, which may ultimately be purchased by said city at its actual cost, and that the said company building it shall not make a net income on the same exceeding 8 percent upon the advances from its own funds made therefor, and that the income from the parts of said building not used at the beginning for library purposes shall be applied to the benefit of said library.

Pursuant to this ordinance and the conveyance made thereunder, the city and the library association entered into a formal written contract, the material parts of which read as follows:

Now, therefore, in consideration of the premises and of one dollar by each of said parties to the other paid, and for the object and intent of said ordinance into effect, and in pursuance of the statutes in such cases made and provided, it is hereby agreed by and between said parties as follows:

First. Said party of the second part shall within the time in said ordinance specified, erect said library building and equip the same for the use of said library, and lease such portion of the same to the city as required and in the manner and on the terms and in all respects as

provided and contemplated in said ordinance, and use and apply the funds received from the city in the manner and for the purpose required in said ordinance, and in all other respects comply therewith.

Second. Said first party shall cause to be conveyed to said second party the library site to wit: The east 100 feet of lot 9 and the east 100 feet of the south 31 feet of lot 10, in block 5, Sioux City east addition, Woodbury County, Iowa, for mentioned consideration of thirty thousand dollars (\$30,000), and for use of said building for library purposes said first party shall pay from year to year a sum equal to the amount specified in and by said ordinance and therein contemplated to be levied and collected by a library tax, which shall in no case exceed three mills on the dollar for any one year, and which sum shall be paid from and out of and shall be raised for that purpose by a special tax, as authorized and provided by section 461 of the Code of Iowa and chapter 18 of the Laws of the Twenty-Second General Assembly of Iowa, and by the statute in such cases made and provided, and which shall be so paid from year to year to the persons and parties and as and in the manner in said ordinance specified, and the amount levied and collected by said library tax shall never be applied or appropriated to any use whatever by said city, except the payment therefrom as specified and contemplated in said ordinance, and to the purchasing and retiring said mortgage debt and contributing to the sinking fund and the purchase of said property, and as provided by said ordinance and the laws governing the same, and such sinking fund shall in no case be applied or appropriated for any purpose whatever save and excepting the retiring of said bonds. And said party shall, from its general funds, as current running expenses of the city, pay annually the rental of four percent upon the value of the part used by it for general city purposes, all as provided in said ordinance, and each party shall on its part perform and keep the requirements in said ordinance provided the same as if written at length in this contract.

This contract was made on the 9th day of March, 1901. On July 1, 1901, the Library & Building Association issued \$80,000 in bonds against the property, and



soon thereafter undertook the erection of a building on the lot conveyed to it. In so doing it damaged plaintiff's abutting property, and in an action brought by him against the city and the library association he recovered judgment against the association in the sum of \$3,125. The city was held not liable in that suit for the damages done. While a motion for a new trial was pending in that case the Library & Building Association transferred the building and grounds to the city of Sioux City. This occurred August 23, 1899. Soon thereafter the city caused its trustees to reconvey the legal title to the property to the library association, and on July 1, 1901, it issued \$80,000 in bonds against the property. From year to year, from that time down to the day of trial, the city caused a levy of taxes to be made according to its ordinance and contract, and, in addition to the interest on the bonds, paid \$57,000 of the principal thereof, and also paid the rentals fixed for the use of its offices. This action is to set aside the deed made by the library association to the city, dated August 9, 1899, upon the ground that it was without consideration; and was and is fraudulent and void, because made with intent to hinder, delay and defraud creditors. The library association was made a party, and being in default, a decree was rendered against it as of date June 19, 1905. Upon trial to the court upon the issues presented by the city a decree was also entered against it as of date June 1, 1907. The city alone appeals, and it did not serve notice on the library association. The primary liability of the city for the damages done plaintiff has been adjudicated, and can not be relitigated in this action, and the only question for determination here is, Should the deed from the association to the city be set aside because without consideration, or by reason of being fraudulent and void as to the creditors of the association?

I. First, it is argued that, as no notice of appeal was served upon the library association, this court is without

jurisdiction of the action, and the appeal should be dismissed. Reduced to its last analysis, the case is an ordinary one wherein a judgment creditor is seeking, by bill in equity, to subject property standing in the name of a stranger to payment of his judgment, upon the ground that this stranger, by reason of fraud or otherwise, holds the title in trust, subject to the payment of his claim. This trust may grow out of a showing of fraud or want of consideration for the conveyance, or it may be shown that the title is in fact held in trust subject to the payment of all just debts of the grantor. In such cases the grantor, while a proper, is not a necessary, party. *Potter v. Phillips*, 44 Iowa, 353; *Harlin v. Stevenson*, 30 Iowa, 371; *Dunn v. Wolf*, 81 Iowa, 688. This is upon the theory that, as the grantor has parted with all his interest in the property, he is concluded by the conveyance from claiming any interest therein. This being true, it was not necessary for the city to serve its notice of appeal upon the library association, for, no matter what the final decree here, its interests can not be injuriously affected. In *Wright v. Mahaffey*, 76 Iowa, 96, it is squarely held that notice of appeal need not be served upon the grantor, although made a party to the proceedings.

II. If we understand the contention made for appellant, it is that the city did not act fraudulently in taking the deed, that it simply took what it had a right to demand under its contract with the library association made prior to the time when any liability to the plaintiff arose, and that in carrying out this contract it perpetrated no fraud. The trial court did not attempt to settle the rights of the bondholders, nor to adjudicate the rights of the city in and to the library property growing out of payments made under the ordinance and contracts hitherto set out. All that it did was to set aside the deed from the library association, which

I. APPEAL: service of notice: necessary parties.

2. FRAUDULENT CONVEYANCES: creditors' suits.

was filed for record August 25, 1899, as being fraudulent and void and of no effect in so far as plaintiff's judgment is concerned. Whatever rights the bondholders may have, and whatever equities may exist in favor of the city independent of the deed, do not seem to have been adjudicated. On this appeal, then, we have the simple question of fact. Was this deed made with intent to hinder, delay or defraud creditors, and should it be set aside for that reason? It will be observed that no certain time was fixed for the reconveyance of the property to the city. The right thereto was optional with the city upon notice given. The purchase price was fixed although not in a stated sum, and was to be more than the city had already invested therein. As to this excess it was in truth a purchaser, and not simply a creditor seeking to secure its claim. Being such purchaser, it occupied a different relation from that of creditor, and, if it knew, or had reason to believe, that the library association was attempting to defraud its creditors, was chargeable with such knowledge, and to the extent of the price paid, or agreed to be paid, or to the valuation over and above its legitimate claims theretofore created, was a trustee for the library association, and the property to that extent was liable to the payment of the debts of the association. There is no doubt under the record that the city had knowledge of plaintiff's judgment, and that the library association was endeavoring to avoid the payment thereof by transferring the property to the city, and we are constrained to hold that the officers of the city either had actual knowledge of such purpose, and participated therein, or that they had such notice as should have put them upon inquiry which, if followed up, would have disclosed the intent of the library association. In either event the deed should be set aside, and the property held subject to the payment of the judgment. *Liddle v. Allen*, 90 Iowa, 738; *Richards v. Schreiber*, 98 Iowa, 422; *Rosenheim v. Flanders*, 114 Iowa, 291; *Carbiener v. Montgom-*

*ery*, 97 Iowa, 659; *Parker v. Parker*, 56 Iowa, 111. As the district court did not attempt to fix the right of the bondholders or of the city independent of the conveyance, we do not do so in this opinion.

All that is now held is that the district court was right in setting aside the conveyance to the city. This being true, the decree must be, and it is, *affirmed*.

STATE OF IOWA, Appellant, v. ANDREW NESLUND, Appellee.

**Pure food: LABELING PACKAGES.** A dealer commits no offense against the pure food statutes, relating to labeling packages to show their constituents, by taking small amounts from an ordinary commercial package properly labeled and selling the same to customers without further labeling the same

*Appeal from Polk District Court.*—HON. W. H. McHENRY, Judge.

TUESDAY, MARCH 9, 1909.

DEFENDANT was indicted for the crime of selling, exchanging, delivering and having in his possession, with intent to sell, exchange and expose and offer for sale, misbranded and adulterated food. A jury was waived, and upon submission to the court the defendant was found not guilty. From the judgment the State appeals.—*Affirmed*.

H. W. Byers, Attorney General, and Chas. W. Lyon, Assistant Attorney General, for the State.

Gillispie & Bannister, for appellee.

DEEMER, J.—The sections of the law under which the

indictment was found being 4999a20, 4999a21, and 4999a22 (Code Supp. 1907), read as follows:

No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant or agent of any other person, firm or corporation, shall manufacture or introduce into the State, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act. Provided, that none of the penalties set forth in this act shall be imposed upon any common carrier for introducing into the State, of having in its possession, any adulterated or misbranded articles of food, where the same were received by said carrier for transportation in the ordinary course of its business and without actual knowledge of the adulteration or misbranding thereof. Provided, that any manufacturer, wholesaler or jobber may keep goods specifically set apart in his stock for sale in other states, which might otherwise be in violation of the provisions of this act. . . . The term 'misbranded' as used herein shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food product which is falsely branded as to the State, territory or country in which it is manufactured or produced, or which bears any statement of the weight or measure unless the same be a correct statement of the net weight or measure of the contents. For the purpose of this act an article of food shall be deemed to be adulterated: First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity. Second. If any substance or substances has or have been substituted wholly or in part for the article. Third. If any valuable constituent of the article has been wholly or in part abstracted. . . . Eighth. . . . Provided, that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated in the following cases: (1)

. . . (2) In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are mixtures, compounds, combinations, imitations or blends, provided that the same shall be labeled, branded or tagged, so as to show the exact character and the name and quantity or proportion of each constituent thereof; and provided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or imitation.

The case was tried upon an agreed statement of facts, the material parts of which are as follows:

That the defendant, on or about the 26th day of February, 1908, sold and delivered to one Lytton a package of lard amounting to about one pound. That the said package of lard was taken from a 50-pound can of lard, which was in the store of the said defendant, Neslund. That the said Neslund did not attach to the said 10-cent package of lard any label or tag showing the constituent elements thereof. That the said lard was in fact 96 percent pure lard, 4 percent beef suet, one ounce B. Heller & Company's lard purifier to 200 pounds of lard; that the said 50-pound can of lard in the store of the said defendant had standing against it a large placard which had printed thereon in large type the following: 'My lard is composed of the following ingredients and none other: Ninety-six percent pure lard, 4 percent beef suet, 1 oz. B. Heller & Co.'s lard purifier to two hundred pounds of lard.' That the said placard was tied with a cord around the can in which the lard was kept. The charging part of the indictment reads as follows: For that the defendant did have in possession with intent to sell, exchange and expose and offer for sale and exchange, and did sell, exchange and deliver to one E. C. Lytton a certain quantity of lard, so called which contained and had mixed with it beef stearin; that the same was not labeled, branded or tagged so as to plainly indicate that it was a mixture, compound, combination, imitation or blend; neither was it labeled, branded or tag-

ged so as to show the exact character and the name and quantity or proportion of each constituent thereof.

The statutes relied upon are penal in character, and must have a strict construction, and the only question in the case is: Do they cover such a transaction as is disclosed by the agreed statement of facts. It may be conceded for the purposes of the case that the article sold by defendant was adulterated, within the meaning of the statutes under consideration; but, in order to justify a conviction under the statute, it must be shown, as we think, that the article sold may properly be defined as a package. The lard which defendant sold was taken from a package which was properly labeled, and he is accused of having in possession, with intent to sell, a quantity of lard which was not properly labeled. The proof in no manner sustains this charge, unless the small amount taken by him from a properly labeled package, and sold to Lytton, was a package which in itself should have been labeled as the law provides. The state makes no contention that the original package from which the pound of lard was taken was not properly labeled as required by law, and its sole contention here is that no matter how small the quantity, or what the nature of the package, the retailer must label it the same as if he were the manufacturer, and that each separate subdivision of the goods taken from a properly labeled package in and of itself constitutes a package which must be labeled as the one prepared by the manufacturer. This does not appear to have been the legislative intent; and, taking the act as a whole, we think it clearly appears that it is the package which is put up by the manufacturer or packer for commercial purposes. True the word "dealer" is used, but the term is found in conjunction with the words "manufacturer" or "packer," and undoubtedly has reference to the ordinary package put up by the dealer as a manufacturer or packer puts it up, as distinguished from

a small amount taken from a package properly put up by a manufacturer or packer. Of course, neither a manufacturer, packer or dealer will be allowed to avoid the law by putting up unusually or unreasonably large packages for the purpose of avoiding the law; but, if commercial usages are followed, and the ordinary sized packages put up for commercial use are properly labeled, a dealer is not liable to prosecution for taking small amounts from these properly labeled packages and selling to his customers without a label. A package usually means a bundle put up for commercial handling, *State v. Board of Assessors*, 46 La. Ann. 145 (15 South. 10, 49 Am. St. Rep. 318), and as used in the action under consideration, it means the package put up by the manufacturer or packer or dealer for ordinary commercial use. It does not apply, in our opinion, to small amounts taken from properly labeled packages to meet the wants or desires of a particular customer who does not care for the package so put up. We have already intimated that the trade can not, for the purpose of avoiding the provisions of the act, put up unusually large packages, or otherwise change their business so as to avoid the manifest purpose or intent of the act. But the act can not, without undue license, be held to apply to small sales from ordinary commercial packages properly labeled. The dealer has the right to supply this small demand; and, so long as his conduct is not such as to indicate a purpose to avoid the statute by selling what would ordinarily be deemed to be the equivalent of a commercial package, by taking that amount from an unusually large one, his act is not to be deemed in violation of law. In confirmation of this view, see *Haley v. State*, 42 Neb. 556 (60 N. W. 962, 47 Am. St. Rep. 718); *Commonwealth v. Schollenberger*, 156 Pa. 201 (27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32).

The judgment of the district court seems to be correct, and it is *affirmed*.



H. E. TEACHOUT V. ALEXANDER DUFFUS and SUSAN  
DUFFUS ET AL., Appellants.

**Easements: IMPLIED GRANT.** On the conveyance of one of two adjoining lots, upon the boundary line between which a driveway has been constructed for the accommodation of both, by one in whom there was an unity of title and possession, there is an implied grant of the right to use the driveway as an easement appurtenant to the lot conveyed.

**Mortgages: FORECLOSURE: PARTIES.** The foreclosure of a mortgage does not cut off the rights of persons in the property who are not made parties to the proceedings.

*Appeal from Polk District Court.*—HON. A. H. McVEY,  
Judge.

TUESDAY, MARCH 9, 1909.

ACTION in equity to confirm an easement as appurtenant to the plaintiff's premises and to enjoin the defendants from interfering with the plaintiff's use thereof. The plaintiff was awarded a part of the relief prayed, and both parties appeal. The defendants will be designated herein as appellants.—*Affirmed.*

*Dudley & Coffin*, for appellants.

*S. B. Allen and Sullivan & Sullivan*, for appellee.

SHERWIN, J.—An opinion in this case was filed on the 9th of April, 1908, but a rehearing was granted, and the case has been resubmitted.

The plaintiff is the owner of lot 13 and the South one-half of lot 14, in block 14 in the city of Des Moines.

A dwelling house stands within two or three feet of the north line of said property, and the premises are otherwise improved. The defendants are the owners of lot 15 and the North one-half of lot 14 in the same block, and their property is improved and used for residence purposes. The Lewis Investment Company was at one time the owner of all of these lots. It acquired title to the property owned by the plaintiff in August, 1890, and title to that owned by the defendants in 1892, and it held title thereto until November 24, 1894, at which time both properties were conveyed to Geo. H. Lewis, trustee, who subsequently conveyed lot 13 and the South one-half of lot 14 to Nelson Royal, assignee, in March, 1898. Nelson Royal and Geo. H. Lewis joined in a conveyance of the last-mentioned property to one Newton, the plaintiff's remote grantor. The Marble Savings Bank acquired title to lot 15 and the North one-half of lot 14 by sheriff's deed in March, 1900, and conveyed said property to Duffus in October, 1904. Between July, 1892, and March, 1898 (on which later date the plaintiff's property passed from Nelson and Lewis to Newton), both properties were owned in fact by the Lewis Investment Company. After the investment company had become the owner of both properties, it constructed a driveway along the center line of lot 14, the south side of said driveway being two or three feet north of the north side of the house on the plaintiff's property. This driveway extended across the lot to the barn on the east end thereof, and it was made of cinders. The investment company also constructed a coal chute on the north side of the plaintiff's house and arranged the furnace room and furnace so that the coal used should be taken in through said chute. There was no way of getting to this chute with coal except by use of the driveway in question, and the driveway was continuously used for that purpose and for the purpose of reaching the plaintiff's barn until it was obstructed by the defendants a short time before this suit was commenced.

The plaintiff and his grantors, when they purchased, understood that the driveway was a part of the property purchased, and that it was necessary for the use of said property. On the original submission of this case the plaintiff urged that the true line between the properties was the north line of the driveway, and, further, that the line was fixed by mutual agreement and acquiescence. Both of these positions he now abandons and relies solely upon his third contention, which was that there was an implied grant of the easement at the time of the conveyance by the Lewis Investment Company to the plaintiff's grantor. At the time the driveway was constructed and the coal chute put in, the Lewis Investment Company was the owner of both pieces of property.

There was unity of title and possession when the conveyance was made to the plaintiff's grantor, and in such cases it is settled that on the conveyance of one parcel of such land there is an implied grant or reservation "of all apparent or continuous easements or incidents of property which have been created or used" by the owner "during the unity of possession, though they could then have had no legal existence apart from his general ownership." Washburn on Easements, 81; *Carrigg v. Bank*, 136 Iowa, 261, and cases therein cited. That the driveway in question was an apparent and visible easement belonging to the property conveyed to the plaintiff's grantor does not admit of doubt, and, if it is reasonably necessary for the use of his property, he is entitled to its continuance. If the driveway were to be now closed, the plaintiff would be compelled to make substantial changes in his house and grounds, all of which would be a serious damage to his property. We reach the conclusion therefore that the driveway is reasonably necessary for the fair enjoyment of the plaintiff's property, and that he had the right to continue its use.

The mortgage through which the Marble Savings

Bank acquired title was executed before the investment company took title to the property, but the then owner of the plaintiff's property was not made a party to the foreclosure proceedings, and his rights were not therefore cut off. *Phillips v. Blair*, 38 Iowa, 649; *Thompson v. Miner*, 30 Iowa, 386; *Carrigg v. Bank*, *supra*. The appellee does not now press the claim that a part of his barn should be permitted to stand on the defendants' land, and we need say no more on the subject than that we think the decree below right in all respects.

The judgment is therefore *affirmed*. on both appeals.

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ISAAC COHEN, Appellee, v. SIOUX CITY TRACTION COMPANY, Appellant.

**Street railways: INJURY TO PASSENGER: NEGLIGENCE: EVIDENCE.**

- 1 Where the evidence concerning a street car accident, though conflicting, warranted a finding that plaintiff gave a stop signal which was recognized by the conductor and a purpose to stop the car was manifest, and with knowledge of this fact plaintiff with ordinary care was in the act of alighting, when by a sudden jerk of the car he lost his footing and was dragged some distance before the car came to a stop, a verdict of negligence on the part of the company should not be disturbed.

**Same: INSTRUCTION.** Where the evidence tended to show that it

- 2 was the usual custom for street cars to stop at street intersections only, so that the conductor might have understood a stop signal as indicating a desire to alight at the next street rather than at an intermediate point, the jury should have been instructed that defendant was not bound to anticipate that plaintiff would leave the car elsewhere than at the usual stopping place.

**Same: NEGLIGENCE.** Where a street car passenger indicates to the

- 3 conductor a desire to leave the car at a place other than the usual stopping place and the conductor understanding the re-

quest assents thereto, and the car having stopped or slowed down so that the passenger may with reasonable prudence attempt to alight but is injured in so doing by a sudden jerk of the car, the company is liable for negligence.

**Practice:** INFORMAL OR DEFECTIVE VERDICTS: CORRECTION. It is proper 4 to recall a jury to correct an informal or defective verdict where the same can be done promptly and without prejudice to the losing party; as where the jury returned both verdicts, one for plaintiff assessing his damages and the other for defendant, a recall and poll of the jury on the same day showed that the return of defendant's verdict was a mistake properly guarded defendant's rights, and his objection to the corrected verdict was rightly overruled.

*Appeal from Woodbury District Court.*—HON. WILLIAM HUTCHINSON, Judge.

TUESDAY, MARCH 9, 1909.

ACTION at law to recover damages for personal injury. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

*J. S. Lawrence*, for appellant.

*Jepson & Jepson* and *J. W. Hallam*, for appellee.

WEAVER, J.—The plaintiff alleges that, having entered one of the defendant's cars for the purpose of becoming a passenger thereon, another person standing upon the street called him to return, whereupon he signaled the conductor to stop the car (which had begun to move forward) and permit him to alight, and while in the act of alighting or preparing so to do the defendant's servants, knowing his peril, suddenly and negligently increased the speed of the car, throwing him to the ground in such manner that his arm was crushed under the wheels, and he was otherwise seriously injured. The defendant denies all of the allega-

tions of the petition and alleges that plaintiff was injured by reason of his own negligence.

The plaintiff's evidence tends to show that on the evening of July 7, 1906, at the corner of Fifth and Douglass streets in Sioux City, he boarded one of defendant's cars moving east along Fifth Street and in the direction of Pierce Street. The car was of the open or summer pattern, passengers entering their seats from the side over footboards provided for that purpose. Plaintiff took a seat near the middle of the car, but before it reached the alley at the middle of the block one Renstad, standing upon the street, called to plaintiff to come back. Responding to this call, plaintiff asserts that he arose, and, standing upon the footboard, supported himself by grasping the handhold or bar with one hand, and with the other gave the conductor, who was looking at him, the signal to stop. His version of what then occurred is stated in the abstract, as follows:

I was on the top board, and raised my hand for the conductor to stop. I saw the conductor at the time. He was ahead of me. I was standing on the running board and held with my left hand the brass bar, and with my right hand signaled for him to stop, and the conductor winked and motioned me this way (indicating). I said 'Yes,' and he blew the whistle, and the car slacked up, and I went down on the running board, on the lower board; yes, on the lower running board, and then he whistled twice, the conductor, and then the car gave a big move, you know, kind of a jerk, and then I fell down. I fell right down and hit right here (indicating). At the time of this forward move of the car I was standing to the east and faced to the east. I held on the car with my left hand. You see this, say, is east, I was standing or leaning this ways (indicating), holding on with my left hand for the bar with the handle. When I fell I fell right on the first running board, and my head hit right on the running board, and I got hurt right up here (indicating). I struck on the top running board. The scar over my eye

is where I struck. My feet was on the ground, and my body was on the running board, on both running boards; on one I was hanging with my left arm. I was hanging this way (indicating) on the top running board, and my feet was dragging on the ground. I fell right by the Lerch building. There was a pile of sand there. There was a pile of sand and then there was an alley. The pile was west from the alley, and the Lerch building is west of the alley. I think it was about twenty-five feet west of the alley that I fell, right by the sand pile. I do not know how long I remained in that position, but I got—well, I was unable to hold on and turned loose.

That he did fall from the car and received an injury necessitating the amputation of his arm is not controverted upon the trial. One or two other witnesses corroborate him in the statement that as he was in the act of alighting there was a jerk or increase of speed by the car, and that he fell, grasping the handrail or footboard, and in this position was dragged a distance estimated at from seventy-five to one hundred and fifteen feet before his hold was broken, and he passed under the wheels. The testimony on part of the defendant tends very strongly to show that no signal to stop was given, or that, if given, it was not seen by the conductor, and that plaintiff in attempting to leave the car while in motion fell and was injured without negligence on part of the conductor or motorman. The jury found for the plaintiff, and from the judgment rendered upon the verdict the defendant appeals.

I. The first exception argued by counsel is to the refusal of the trial court to direct a verdict for defendant because of the alleged insufficiency of the evidence to support the charge of negligence. As we have already indicated, the evidence upon this issue is in sharp conflict, and, while the number of witnesses preponderates in favor of defendant, the rule which requires the truth of such contention to be submitted to the jury is too elementary to re-

1. STREET RAIL-  
WAYS: injury  
to passenger:  
negligence:  
evidence.

quire argument or citation of authorities. Counsel's insistence that the testimony as to the dragging of plaintiff for a considerable distance after he fell, and while he was calling for help, is confined to a single witness, one Bunch, is not sustained by the record. The testimony of Bunch in this respect is corroborated to a material degree by that of the witnesses Mrs. Williams and A. Whitebook, and by the plaintiff himself. If the jury found, as it might have done, under the evidence, that plaintiff gave the conductor the stop signal, and the conductor recognized it and indicated a purpose to stop at that place as requested, and as plaintiff was, with the knowledge of the conductor, in the act of alighting, the speed of the car was suddenly increased, causing him to fall, and that after his fall he was dragged from seventy-five to one hundred and fifteen feet, crying aloud for help, before the car was brought to a stop, a conclusion of negligence drawn from such facts ought not to be disturbed by the court. There was therefore no error in overruling this ground of the motion for a new trial.

II. The defendant submitted certain requests for instructions to the jury, among which was the following: "You are instructed that under the evidence in this case

a. SAME:  
instruction.

it was not the duty of the defendant or its conductor to anticipate that the plaintiff would leave the car at the time he attempted to do so, and if the plaintiff alighted, or attempted to alight, from the car in question before it reached the place at the street crossing of Pierce Street, where said cars ordinarily and usually stopped, pursuant to the usual and ordinary operation of defendant's street cars on the line and place in question, then the defendant was not guilty of any negligence in failing to anticipate that plaintiff would alight at the place where he attempted so to do." This request was denied, and no instruction was given by the court covering the point thus suggested. While the phraseology



of the request is probably open to criticism and should have been modified, the central thought embodied therein, that the railway company was not bound to anticipate the attempt of the passenger to leave the car elsewhere than at its usual or regular stopping place, ought to have been stated to the jury in some form. The testimony tended to show that the regular stopping places for defendant's cars were at the street intersections, and the car in question, having passed Douglass Street, would not regularly stop again until it reached Pierce Street. Under such circumstances a stop signal given after the car had passed Douglass Street, without other circumstances indicating to the conductor a different intention on part of the passenger, would naturally and properly be interpreted as a request to stop at Pierce Street, and the defendant would not be chargeable with negligence for acting upon that assumption and failing to stop the car sooner. The error involved in refusing this instruction is in effect repeated or emphasized in the ninth paragraph of the court's charge, and for the reasons stated we hold the exception taken to said paragraph is well grounded.

In this holding we are not to be understood as saying that as a matter of law defendant could not have been negligent as charged in the petition, for if the plaintiff  
3. SAME: by word or gesture indicated to the conductor  
negligence. tor a desire to leave the car at the point where they then were, and the conductor, understanding the request, indicated his assent thereto, and the car having stopped or slowed down to such a degree that plaintiff, acting as a reasonably prudent person, and with the knowledge of the conductor, was attempting to alight, and while so doing was thrown off by a sudden increase in the speed of the car, then there was negligence for which the company would be liable.

III. It appears from the record that, at the close of the trial, the arguments being completed, and the jury

having been instructed by the court, the parties in open court agreed to the return of a sealed verdict. With the written charge of the court the jury was given two blank forms of verdict, as follows: "Verdict No. 1. We, the jury find for the plaintiff, I. Cohen, and against the defendant the Sioux City Traction Company, and assess the amount of his recovery at \$———, Foreman. Verdict No. 2. We, the jury, find for the defendant, the Sioux City Traction Company. ———, Foreman." After reaching an agreement during the evening of the same day, the jury signed and sealed its verdict and separated. On the following morning the verdict, being opened and read in court, was found to be in the following form: "Verdict No. 1. We, the jury, find for the plaintiff, I. Cohen, and against the defendant the Sioux City Traction Company, and assess the amount of his recovery at \$2,500.00. [Signed] W. C. West, Foreman." And: "Verdict No. 2. We, the jury, find for the defendant, the Sioux City Traction Company. [Signed] W. C. West, Foreman." When this situation developed plaintiff moved the court to recall the jury to correct what counsel claimed to be an evident mistake or inadvertence, to which order and proceeding the defendant objected on various grounds and insisted that the verdict be treated by the court as one for the defendant. The court directed the jury to be reassembled at two o'clock of the afternoon of the same day, at which time all of the jurors constituting the panel of twelve appeared in the box, and the court directed the clerk to call the roll upon their verdict, to which and to each subsequent step in the proceedings the defendant objected. Responding to this call, each of the twelve jurors announced his verdict to be for the plaintiff. The court then asked the jury whether the signing of the second form of verdict was a mistake, and upon calling the roll each juror answered that it was a mistake. All objections by the

4. PRACTICE:  
informal or  
defective  
verdicts:  
correction.

defendant were overruled, and the verdict was recorded as a verdict for the plaintiff, and upon these rulings error is assigned.

In our judgment the trial court did not exceed its power or abuse the discretion with which it is vested in such matters. It is true that the verdict was irregular in form, yet the irregularity was upon its face so evidently the result of inadvertence upon part of the jury or its foreman, that, in the absence of any showing of prejudice, we are not prepared to say that the court would have been chargeable with error had it treated the verdict as one for plaintiff, even without recalling the jury for further examination, though that is a question not here presented, and we need not pass upon it. See the opinion of this court in *Gillespie v. Ashford*, 125 Iowa, 729, where a case somewhat similar to the one now before us was under consideration and the authorities bearing thereon were collected. It is, we think, a common and proper practice, where informal or defective verdicts have been returned, to recall the jury for their correction, where the same can be done promptly or within a reasonable time, and verdicts thus corrected are permitted to stand, in the absence of any showing from which prejudice to the losing party may be inferred. In the case before us the trial court appears to have guarded the rights of the defendant in this respect with all due care, and the objection made to the reception of the verdict as corrected was properly overruled.

For the reasons stated in the second paragraph of this opinion, a new trial must be ordered, and for that purpose the judgment of the district court is *reversed*.

HAMILTON COUNTY, IOWA, v. FRANK HOLLIS, Appellant,  
and FRED HOLLIS.

**Counties: SUPPORT OF POOR: RECOVERY OF EXPENDITURE: PLEADING.**

1 A petition alleging that a county charge was furnished food, clothing, medicine and medical attendance at the expense of the county for a specified time and price per week, to which was attached an account for board, washing, care, medical attendance and medicine for the same time and price, should be treated as presenting a cause of action for the amount expended rather than for the reasonable value of the support furnished, as the account merely made the petition more specific.

**Same.** The county is not limited in its recovery for support of  
2 the poor to money actually paid out, but may recover of the indigent person, his estate, or of those by statute liable for his support, such sums as it has expended for relief and support at the poorhouse or elsewhere.

**Same: EVIDENCE OF AMOUNT DUE.** The mere fact of difficulty in  
3 determining the amount expended in support of each individual at a county poor farm will not affect the liability of those primarily responsible therefor; and in the absence of evidence to the contrary the expense will be presumed to have been the reasonable value of maintaining each, and evidence of such reasonable value is admissible at tending to prove the amount due.

**Same: APPLICATION FOR SUPPORT.** It is not necessary that applica-  
4 tion for the support of an indigent person at county expense be made by the recipient of the bounty, it may be made by another.

**Same: WHO ARE POOR PERSONS.** A poor person, within the con-  
5 templation of the statute relating to their support at public expense, is one who has no property which can aid in his support or out of which funds can be realized for his maintenance; so that an aged couple having only the life use of a small, out of repair dwelling, with no means and physically unable to support themselves are poor persons within the meaning of the statute.

**Same: RECOVERY BY COUNTY.** A county is not precluded from re-

- 6 covering of the relatives of a poor person the expense of his support at the poor farm because their liability has not been first adjudicated as provided by Code section 2219.

**Same:** SUPPORT OF SOLDIERS OF THE CIVIL WAR: LIABILITY OF RELATIVES.

- 7 Where the necessities of a soldier of the Civil War and his widow require an expenditure greater than that provided by Code section 2230, they may be maintained at the county poor farm when they voluntarily go there and remain, and their relatives chargeable with their support are liable to the county therefor.

*Appeal from Hamilton District Court.*—HON. W. D.  
EVANS, Judge.

TUESDAY, MARCH 9, 1909.

ACTION for money expended in the care of defendant's parents. Verdict was returned in favor of Fred Hollis by the direction of court and against Frank Hollis on submission to the jury. Judgment was entered thereon, and Frank Hollis appeals.—*Affirmed.*

*D. C. Chase and Wesley Martin*, for appellant.

*A. N. Boeye and J. M. Blake*, for appellee.

LADD, J.—This is an action by the county against defendants for money expended in the maintenance of their father and mother at the poor farm. The parents had lived in a small house with two lots in Homer, and had been receiving \$4 per month from the county for several years. They were about eighty and seventy-eight years of age, respectively, both feeble and childish, and able to do little. They were taken to the poor farm September 20, 1903, and remained there until June 14, 1906, when the woman died. He left the following day. The evidence tended to show that the expense of their maintenance and care was from \$1.75 to \$3.50 per week. Several er-

rors are assigned, but only those touched in the brief or argument will be considered.

I. The petition alleged that Hollis and wife were furnished food, clothing and medicines and medical attendance at the expense of the county during one hundred and forty weeks at \$3.50 per week, aggregating \$980, "which plaintiff, Hamilton County, expended for their use and benefit." To this petition was attached an account "for board, washing, care, medical attendance, and medicine" for that time at the same price each per week. Appellant argues that in view of this account the action should be treated as for these items rather than for the money expended therefor by the county. As the account is made a part of the petition, it should be regarded merely as making more specific its averments. From both it clearly appeared that the action was for the amount expended for the items mentioned, rather than for their reasonable value.

II. Appellant urges, however, that the county can not recover save for money actually expended and directly paid out for the relief or support of the poor. The statute under which this action was brought reads:

2. SAME.

"Any county having expended any money for the relief or support of a poor person, under the provisions of this chapter, may recover the same from any of his kindred mentioned herein, from such poor person should he become able, or from his estate; from relatives by action brought within two years from the payment of such expenses, from such poor person by action brought within two years after becoming able, and from such person's estate by filing the claim as provided by law." Section 2222, Code. Among the kindred made liable by this section in connection with section 2216 of the Code are the children. These statutes ought not to be given the narrow construction contended for. "The relief may be either in the form of food, rent or clothing, fuel and lights, medical

attendance or in money." Section 2230, Code. It is the money expended in furnishing such support or relief which may be recovered under the section quoted. If it has been expended by the county for the relief or support at the poor farm, or elsewhere, it is as plainly within the language of the statute as though paid directly to the indigent person. Nor does the provision that the inmates be required to perform work suitable to their bodily condition militate against this interpretation, though this may have some bearing in ascertaining the amount the county has expended in their behalf, a point not necessary to be considered at this time.

III. As several persons usually are maintained at the poor farm, some difficulty may be experienced in ascertaining the portion expended for the support of each person. This alone will not justify the denial of relief to the county against persons primarily liable. It may be presumed, in the absence of evidence to the contrary, to have paid out the reasonable value of maintaining each person at the poor farm, and we think evidence of such reasonable value was admissible as tending to prove the money expended in their behalf.

3. SAME:  
evidence of  
amount due.

IV. The suggestion that no application was made for support such as is exacted by section 2234 is unfounded. The evidence was to the effect that Dr. Rogers directed the attention of the township trustees to the condition of these people and insisted that they be taken care of. It is not necessary that application be made by the recipients of the public bounty. *Clay County v. Palo Alto County*, 82 Iowa, 626.

4. SAME:  
application  
for support.

V. The appellant insists that his parents were not "poor persons" within the meaning of the statute. Section 2252 of the Code declares that: "The word 'poor' and 'poor persons' as used in this chapter, shall be construed to mean

5. SAME:  
who are poor  
persons.

those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities to earn a living by labor; but this section shall not be construed to forbid aid to needy persons who have some means, when the board shall be of opinion that the same will be conducive to their welfare and the best interests of the public." The persons receiving succor in this case were without property, save they were entitled to the use of the house and two lots at Homer. This property had been conveyed by them to a daughter some days prior to being taken to the poor farm, but they reserved the use for life. The house was one story with two small rooms and kitchen, out of repair, and its use was of no value to them, as they were unable to care for themselves. The statute, fairly construed, means that a person to come within the class mentioned must be without property which can aid in his support or out of which funds may be realized for his maintenance. See *Hardin County v. Wright County*, 67 Iowa, 127. The parents were within the class defined.

VI. No fraud was practiced on the parents in bringing them to the poor farm. They went there voluntarily, though on the expectation that they would soon return, and remained there on their own volition. The

6. SAME:  
recovery  
by county.

contention that the liability for the support of a poor person by relatives must be first fixed under section 2219 of the Code was disposed of some fifty years ago in *Boone County v. Ruhl*, 9 Iowa, 276.

Hollis was a soldier in the late Civil War, and it is argued that taking him to the poor farm was in violation of section 2231 of the Code, which provides that: "No

7. SAME:  
support of  
soldiers of the  
Civil War:  
liability  
of relatives.

person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the poorhouse when they can and prefer to be relieved to the extent above provided, and other persons and families may, at the discretion of



the board also be relieved." The relief mentioned above is that furnished under section 2230 of the Code, which limits the trustees to the expenditure of \$2 per week for each person. Whether the necessities of Hollis and wife required more than this, and whether they voluntarily went to the poorhouse, was submitted to the jury under appropriate instruction. This was correct interpretation of the law, and, if there has been omission of duty, the fault was not of the trustees. See sections 431, 432, Code.

The record is without error, and the judgment is *affirmed*.

EVANS, C. J., took no part.

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FRED F. PEASE v. GLOBE REALTY COMPANY and S. S. STILL, Appellants.

**Vendors: RECOVERY OF PURCHASE PRICE: BREACH OF AGREEMENT TO**

- 1 PERFECT TITLE. Judgment on a promissory note given in settlement of the purchase price of land containing a condition precedent to payment should not be entered until the condition is performed, where the same is pleaded in defense; as where the instrument provided that payment should be subject to a proceeding to clear the grantor's title which rested upon a tax deed and the period of limitation barring the right to question its validity had not run, a breach of the condition was sufficient to defeat recovery on the note.

**Corporations: EXECUTION OF INSTRUMENTS: PERSONAL LIABILITY. One**

- 2 who signs an instrument as president of a corporation, and not in his individual capacity, is not personally liable thereon; and the allegations of the petition as to personal liability will control the mere recitals of the record as to the exhibit from which it might be inferred that he signed as maker, describing himself as president.

*Appeal from Polk District Court.*—HON. JESSE A. MILLER, Judge.

TUESDAY, MARCH 9, 1909.

ACTION to recover balance due on a written instrument for the payment of a part of the purchase price for certain city lots. On trial to the court without a jury, judgment was rendered against both defendants, and they appeal.—*Reversed*.

*Clark & Byers and Evans & Evans*, for appellants.

*Spurrier, Mills & Perry*, for appellee.

McCLAIN, J.—The instrument sued on was in form a promissory note for \$200, to which was added the following clause: "Subject to the clearing of title to lots in Hyde Park for which this is given as part purchase price." It appears that all the lots included in the purchase, for part payment of which the note was given, were in Hyde Park addition to the city of Des Moines, and were held by the grantor under tax deeds. It also appears that an action to quiet title was brought, in which title to all the lots save one was quieted in the defendant Globe Realty Company, the grantee of the lots.

It is contended for appellee that defendant's grantor had good title by tax deed to this lot, as well as to the others; but it is to be noticed that the condition in the note

1. VENDORS: recovery of purchase price: breach of agreement to perfect title.

was not that the grantor had good title, but in effect that the title should be cleared, and it appears that the parties considered this provision to require that some action be brought to quiet the title. While a tax title is no doubt presumptively good, as a tax deed is *prima facie* evidence that all the requirements of the statute have been complied with, and is conclusive evidence that the tax for which the property had been sold was properly assessed, and that the property was duly sold, and further that all the officers performed their duty with reference to the levy and enforcement of the tax and the execution of

the deed (Code, section 1444), it is well settled that a tax deed may be attacked for insufficiency of the notice given by the holder of the certificate of sale of the expiration of the period of redemption. *Young v. Iowa Toilers' Protective Ass'n*, 106 Iowa, 447; *Grimes v. Ellyson*, 130 Iowa, 286. At the time the conveyance was made the five-year limitation on an action to question the validity of the tax deeds had not run, and the condition of the note evidently contemplated some proceeding by which those who would be entitled on any ground to attack the validity of the sale would be cut off from doing so. Breach of the condition was pleaded by the defendants, and the failure of plaintiff to show the performance of the condition as to one of the lots should have been held by the trial court to be sufficient to defeat plaintiff's action.

For another reason the judgment as against defendant Still was erroneous. As against him the petition alleges no cause of action. The instrument sued upon is described as executed by "the defendant Globe Realty Company by its secretary, J. J. Coull, and president, S. S. Still." If Still signed for the company as its president, and not in his individual capacity, the Globe Realty Company alone was bound by the instrument. The description of the instrument in the exhibit thereof attached to the petition might perhaps be considered to indicate that Still signed as a maker, describing himself as president of the company; but the allegation of the petition must control a mere recital of the record as to the exhibit, and judgment should not have been rendered against the defendant Still.

2. CORPORATIONS:  
execution of  
instruments:  
personal  
liability.

For the reasons pointed out, the judgment is *reversed*.  
EVANS, C. J., took no part.

G. F. LEONARD v. J. N. OMSTEAD ET AL., Appellants.

**Agency: FRAUD OF AGENT: ACCOUNTING.** An agent is required to  
1 account to his principal for any profit he may have acquired from the transaction by concealment of facts which it was his duty to disclose to enable the principal to deal the most advantageously; and it is immaterial that the principal has lost nothing, but the accounting may be had if the agent derived the secret profit.

**Same: PROOF OF AGENCY: EVIDENCE.** Agency arises out of a con-  
2 tract relation but need not be proven by an express agreement, it may be inferred from the circumstances. In the instant case the evidence is held to show the relation of agency at a time when defendant arranged with the party with whom his principal was exchanging lands to derive a secret profit from the transaction, and he is held to account therefor

*Appeal from Wright District Court.—HON. R. M.  
WRIGHT, Judge.*

TUESDAY, MARCH 9, 1909.

**ACTION** to recover from defendant Omstead and his grantees, F. E. and F. L. Beshy, a tract of land alleged to have been procured by Omstead as the agent of plaintiff in fraud of plaintiff's rights. Plaintiff asked that, in the event of a finding by the court that the Beshys are innocent purchasers and should not be required to surrender the land to plaintiff, then defendant Omstead be required to pay in damages the amount for which said land was sold, less the amount expended by him in procuring the same. The trial court found that under the evidence the Beshys were innocent purchasers and entitled to hold the land as against plaintiff, and further that defendant Omstead had procured title thereto in fraud of plaintiff's rights while

acting as plaintiff's agent, and that he should account for the amount received by him on sale of the land, and rendered judgment against him in plaintiff's favor for \$3,520, with interest. The defendant Omstead, who will be treated as sole defendant in the further discussion of the case, appeals.—*Affirmed.*

*Nagle & Nagle*, for appellant.

*McGrath & Archerd*, for appellee.

MCCLAIR, J.—In May, 1905, plaintiff, who is a resident of this State, went to Dickey County, N. D., and there met one Caldwell, with whom he entered into negotiations for the exchange of plaintiff's farm, containing about one hundred and sixty acres, in Iowa, for the farm of said Caldwell, containing about three hundred and twenty acres, in North Dakota. The details of the terms of the exchange are not important, but plaintiff's contention is: That he offered his own farm at a cash value of \$70 per acre and took the farm of Caldwell on the representation that it was of the cash value of \$25 per acre; that defendant Omstead, acting as plaintiff's agent in the negotiations for the exchange, became aware that Caldwell was willing to dispose of his farm at the cash price of \$15 per acre, allowing out of that amount \$1 per acre for commission; and that defendant, instead of disclosing this fact to plaintiff, as was his duty, concealed it, and allowed plaintiff to enter into the exchange on the basis of a cash valuation of \$25 per acre for Caldwell's farm, having at the time secured an agreement with Caldwell by which defendant was to take plaintiff's farm off Caldwell's hands at such a valuation as would net Caldwell \$14 per acre for his North Dakota land. Plaintiff asked by way of equitable relief that defendant and his grantees be required to turn over to plaintiff the land thus acquired by defendant

from Caldwell on being reimbursed the amount of his actual outlay in procuring title thereto, on the theory that defendant as agent was bound to account to plaintiff for all the property or profits accruing to him in the transaction as the result of fraud committed upon plaintiff; but the court, finding the grantees to be innocent purchasers for value, rendered judgment against defendant Omstead for the amount of the proceeds of the land which he had thus fraudulently acquired and disposed of after deducting the amount invested by him therein.

If defendant was plaintiff's agent in the negotiations with Caldwell, and, by fraudulently concealing from plaintiff knowledge of the real cash price for which Caldwell was willing to sell his North Dakota land, was enabled to secure an advantage for himself, he ought to account to plaintiff for whatever he secured as the result of his bad faith, and it matters not that plaintiff was satisfied with his purchase of the North Dakota land and has retained it. What defendant in fact secured was the farm which plaintiff thought he was transferring to Caldwell but was in fact transferring to defendant under the arrangement between defendant and Caldwell at a price much less than that for which plaintiff understood that he was disposing of the farm to Caldwell, and plaintiff might properly elect to avail himself of the benefits of this transaction, which was fraudulent on the part of his agent.

An agent is always held under obligation to account to his principal for the property or profits thereof which he has acquired by fraud upon such principal. *Borst v.*

1. AGENCY: fraud  
of agent:  
accounting.

*Lynch*, 133 Iowa, 567; *Rorebeck v. Van Eaton*, 90 Iowa, 82; *Merrill v. Sax*, 141 Iowa, 386; *Snell v. Goodlander*, 90 Minn.

533 (97 N. W. 421). It is immaterial that the principal has suffered no loss in the transaction through the fraud of his agent. It is enough that the agent has derived a profit or advantage by his failure to disclose to the principal facts

which it was his duty to disclose in order to enable his principal to deal with the other party to the transaction to the best advantage. *Holmes v. Cathcart*, 88 Minn. 213 (92 N. W. 956, 60 L. R. A. 734, 97 Am. St. Rep. 513); *Green v. Peeso*, 92 Iowa, 261.

The real question of difficulty is as to whether defendant was the agent of plaintiff at the time defendant became aware that Caldwell was willing to sell his North Dakota land at the net price of \$14 per acre and entered into an arrangement with him to acquire title to the Iowa land at a valuation which would enable Caldwell to realize that amount. The testimony of the witnesses is to some extent contradictory, but we reach the conclusion that the following essential facts were established by a preponderance of the evidence: In May, 1905, plaintiff learned that his brother, W. H. Leonard, and the defendant were about to go to North Dakota to investigate land and arranged to accompany them. He had not previously had any negotiations with defendant in regard to the sale or exchange of his (plaintiff's) farm in Iowa; but defendant, who was a banker and dealer in real estate in the locality where plaintiff and his brother resided, was in fact the agent for W. H. Leonard, going with him for the purpose of assisting him in making exchange of Iowa land for land in North Dakota. During the trip defendant asked plaintiff whether he would turn his land in at \$70 per acre if he found anything up there that looked satisfactory and suited him, and plaintiff replied that he would take \$70 per acre in cash for his land, and might be willing to exchange for North Dakota land on that basis. Defendant said, if plaintiff found anything satisfactory, he (defendant) would do anything he could for him, and if the deal was made they would settle up after they got home. At Monango, in North Dakota, these parties met Caldwell, with whom none of them had had any previous negotia-

2. SAME: proof  
of agency:  
evidence.

tions, and, with a view to effecting an exchange of W. H. Leonard's land for land offered by Caldwell, they looked at several tracts. While they were thus together, it was disclosed to Caldwell that the plaintiff had a farm which he might exchange for land of Caldwell, and the tract for which plaintiff subsequently made an exchange, as well as other tracts, were investigated; plaintiff referring Caldwell to Omstead with reference to the character of plaintiff's land in Iowa. An exchange on the basis of a cash valuation of plaintiff's land at \$70 per acre and Caldwell's land at \$25 per acre was discussed, but not at that time agreed to by either party. Before leaving Monango defendant told plaintiff he thought he had a good deal there if he wanted to carry it through, but said, "We don't want to be in too big a hurry." Plaintiff had endeavored to secure a reduction of \$600 in the price of Caldwell's land, and defendant, aware of that fact, said to plaintiff: "When I get home I will write to Caldwell, and I think we can get this \$600 off."

After returning to Iowa defendant reported to plaintiff that he had been unable to secure any modification from Caldwell of his proposition, and represented to plaintiff that if he wanted the land he should take it at once to secure the bargain, and plaintiff then concluded to make the trade with Caldwell. In the meantime, and while defendant was at Monango, Caldwell had communicated to defendant the fact that he was willing to dispose of the tract of North Dakota land which he was offering to plaintiff for \$25 per acre at \$14 per acre net cash, and asked defendant whether he could get a purchaser for plaintiff's land if he (Caldwell) should make the trade. Defendant gave Caldwell no definite assurance as to what could be done as to selling plaintiff's land, and Caldwell then proposed to transfer it to defendant in the event that a trade was made at such price as would net him \$14 per acre for his North Dakota land. Defendant acceded



to this proposition, and, when plaintiff expressed his willingness to make the trade caused deeds to be executed by plaintiff to Caldwell and by Caldwell to himself for the avowed purpose of concealing from plaintiff the fact that the Iowa land was passing to defendant as a result of the transaction. In connection with the closing of the trade between plaintiff and Caldwell and the passing of the deeds through defendant's hands, defendant represented to plaintiff that the abstract of title to the North Dakota land had been examined by an attorney and pronounced satisfactory, and at the conclusion of the exchange of deeds he suggested to plaintiff the subject of commission, and said that the customary commission of \$1 per acre would be \$160, but, on plaintiff's objecting to the amount, expressed his willingness to accept \$100, whereupon plaintiff gave him his check for that amount. This final transfer and delivery of the check for the commission took place in defendant's bank, and after plaintiff had left defendant handed the check to the assistant cashier of the bank, with the remark that he "got that much commission out of it anyway."

It is insisted for defendant that the facts do not establish an agency, which can arise only by contract; and further that, even if there was an agency while the parties were at Monango, there was none when the plaintiff finally accepted Caldwell's offer and completed the transaction by the passing of deeds through defendant's hands, for, as it is claimed, defendant was at that time acting for Caldwell. But we are well satisfied that defendant recognized an agency on his part for plaintiff at Monango which entitled him to a commission if an exchange of properties between plaintiff and Caldwell should be made, and, if he was plaintiff's agent at that time, it was his duty to disclose to plaintiff the fact that Caldwell was willing to dispose of his land for a net cash price of \$14 per acre while attempting to secure \$25 per acre in the exchange. Cald-

well may have been acting in good faith with plaintiff in putting a mere trade value on his land, assuming that plaintiff was doing the same as to the Iowa land, and may therefore have been willing to dispose of the Iowa land at a price which would net him \$14 per acre for the North Dakota land, and unwilling to make the trade unless he could make an arrangement with defendant assuring him that result; but these facts should have been disclosed by defendant to the plaintiff. Not having disclosed them, he was guilty of bad faith and bound to account to plaintiff for any profit subsequently realized by him as the result of such bad faith, and it mattered not that in the final negotiations he acted only for Caldwell. We are inclined to think, however, that plaintiff understood defendant to be acting for him until the negotiation was finally concluded by the transfer of title. While agency is a relation arising out of contract, yet the contract which gives rise to it may be inferred from the circumstances. It need not be proven by evidence of an express agreement. *Storm Lake Bank v. Missouri Valley L. Ins. Co.*, 66 Iowa, 617; *First Nat. Bank v. Free*, 67 Iowa, 11.

It is contended for appellant that the price fixed by plaintiff on his Iowa land was merely a trading price, and that it was not actually worth more than \$55 or \$60 per acre, and the testimony of several witnesses is referred to as supporting this contention; but the actual value of plaintiff's land is not the basis on which to determine the extent of defendant's liability. He did in fact acquire title to property as the result of a breach of trust toward plaintiff while acting as his agent, and he is bound to account for the value of the property thus acquired. He disposed of the land to the Beshys at \$75 per acre, taking in part pay a stock of goods which he says he disposed of at the value for which he accepted it in the exchange. Under these circumstances he can not contend that he is not

bound to account on the basis of the selling price to the Beshys.

Finding that the decree of the trial court is right in principle and supported by a preponderance of the evidence, it is *affirmed*.

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D. L. VEEDER, Appellant, v. MILDRED R. VEEDER ET AL.

**Mortgages: DEED AS SECURITY.** A deed absolute in form may be  
1 declared a mortgage where it is satisfactorily shown that the  
same was intended as security for a debt, even though given  
subject to a mortgage which the grantee assumed and agreed  
to pay.

**Same: RIGHTS OF GRANTEE.** The grantee in a deed declared to be  
2 a mortgage should be credited with all sums expended by  
him in payment of the grantor's debts, or in improving the  
property.

**Fraudulent conveyances: INTENT OF PARTIES.** The intent with which  
3 a conveyance is made is immaterial so far as creditors of the  
grantor are concerned, if it does not in fact hinder and delay  
them in the collection of their claims.

**Same: LACHES.** A plea of delay in bringing an action to have a  
4 deed declared a mortgage will not avail where the parties were  
brothers, dealing together in other matters, and the grantor's  
indebtedness to the grantee had not been paid.

*Appeal from Wright District Court.*—HON. R. M.  
WRIGHT, Judge.

WEDNESDAY, MARCH 10, 1909.

ACTION in equity asking that a deed absolute in form  
be declared a mortgage and canceled. Judgment for de-  
fendants. Plaintiff appeals.—*Reversed*.

*Nagle & Nagle* and *Peterson & Knapp*, for appel-  
lant.

*Ladd & Rogers*, for appellees.

SHERWIN, J.—February 16, 1893, the plaintiff was the owner of the land in controversy, one hundred and forty-four acres, and on that date he and his wife, conveyed the same to the deceased, W. E. Veeder, by deed of general warranty, subject, however, to a mortgage of \$2,200, with accrued interest thereon, which the grantee, W. E. Veeder, assumed and agreed to pay as a part of the purchase price of the land; but plaintiff remained in possession of the land. At the time of this conveyance the appellant was indebted to various persons and firms, the aggregate amount of which indebtedness greatly exceeded the value of his equity in the land conveyed. Shortly after the transfer, W. E. Veeder paid on judgments which were liens on the land and on claims on which suit had been brought against appellant about \$1,980. He also redeemed the land from a tax sale, paying therefor \$59.95, and thereafter he paid \$230 interest then due on the mortgage. So that practically at the time the land was conveyed to him he furnished the money for and paid off debts due from the appellant aggregating \$2,267.36, aside from the principal of the mortgage that he had assumed to pay, which was \$2,200. In addition to the indebtedness that was paid off by W. E. Veeder, the appellant was indebted in various sums to different creditors aggregating a large amount.

There are no legal questions involved in this case that are not well settled. That a deed absolute in form may be declared a mortgage where it is shown by satisfactory evidence that it was given for and intended as security for a debt is held in numerous cases. *Laub v. Romans*, 131 Iowa, 427; *McElroy v. Allfree*, 131 Iowa, 112. And this is true although the deed is made subject to a mortgage which the grantee assumes to pay. *Dunton v. McCook*, 93 Iowa, 258. While

1. MORTGAGES:  
deed as  
security.

some circumstances are shown which tend to negative the appellant's claim, a careful reading of the entire record has satisfied us that the conveyance was intended merely as security for the amount which should be paid by W. E. Veeder on the appellant's indebtedness.

It is the appellant's contention that the amount paid out for him by W. E. Veeder has been fully repaid, but we are not by any means satisfied that such is, in fact, the case, and the condition of the record is such that we do not feel like attempting to determine the question. We think the case should go back to the district court for an accounting between the parties, and that, in determining the state of the account, the appellees should be credited with all sums shown to have been expended by W. E. Veeder in the payment of the appellant's debts and in improving the property in question. Nothing less than this will satisfy the demands of equity, and the appellant surely can not complain thereof. That the rights of both parties may be thus\* protected is held in *Dunton v. McCook, supra*.

It is the appellees' contention that the conveyance was made with intent to defraud the creditors of D. E. Veeder, and that this action can not be maintained because thereof. For the purposes of this case, it may be conceded that it was the intent of both the grantor and grantee to place the property in the hands of the latter so that something might be eventually saved therefrom for the former; but beyond this we do not think the proof goes. This property was the **homestead of the appellant**, and, except for debts contracted prior to its acquisition as such, **forty acres** thereof was exempt from execution. **There is no showing that any of the debts were contracted before the homestead right was acquired, and hence there was only one hundred and four acres liable for the grantor's debts. According to the appellors' con-**

2. SAME: rights of grantee.

3. FRAUDULENT CONVEYANCES: intent of parties.

tention, the land was not then worth to exceed \$30 per acre. The nonexempt land was worth \$3,120. W. E. Veeder paid off debts amounting to \$2,267.36 as claimed by appellees, and there was a mortgage on the land for \$2,200. It is apparent, therefore, that the conveyance or mortgage did not deprive a creditor of a dollar. On the contrary, it is conclusively shown that the arrangement was beneficial to the creditors because W. E. Veeder furnished more money for the payment of the appellant's debts than could have been obtained by a sale of the land subject to the mortgage. It does not matter then what the intent of the parties to the conveyance was. If the conveyance did not in fact hinder or delay creditors, it was not fraudulent as to them. *Aultman v. Heiney*, 59 Iowa, 654; *Baxter v. Pritchard*, 113 Iowa, 422; *Richards v. Orr*, 118 Iowa, 724; *Dettmer v. Behrens*, 106 Iowa, 586; *Stubblefield v. Gadd*, 112 Iowa, 681.

It is claimed that in 1895 supplemental proceedings were had in which both the grantor and grantee testified as to the amount that W. E. Veeder had paid for the land, and that said Veeder was the absolute owner thereof. It is shown that such proceedings were had, but it is not shown at all satisfactorily that the Veeders testified to more than that W. E. had paid full value for the land, and that upon the showing the judgment creditor who instituted the proceeding became satisfied of the truth thereof, and concluded that the land was not worth more than W. E. Veeder had put into it.

Appellees also claim that this action should have been commenced sooner. The plea of laches can not be sustained under the circumstances shown. The parties were brothers, and were dealing together in other matters, and, if it be true that the appellant's indebtedness to W. E. Veeder has not been fully paid, there was no reason why action should have been taken.

4. SAME: laches.

We reach the conclusion that the judgment must be reversed and the case remanded for the purpose of determining the amount due the appellees as administrators of the estate of W. E. Veeder, and, upon the ascertainment and payment of such sum, conveyance will be made to the appellant, or he may have a decree establishing title in him.—*Reversed and remanded.*

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W. L. WITMER, Appellant, v. T. J. SHREEVES.

**Equitable mortgage: ASSIGNMENT OF MORTGAGOR'S INTEREST: EXECUTION SALE.** Where the grantee's name in a deed was erased and another inserted and the deed was then delivered to him as security for part of the purchase price advanced, with a separate contract back acknowledging receipt of the deed and agreeing to hold the title in trust and to reconvey to the real grantee upon payment of the sum advanced, such substituted grantee held the apparent legal title and both the real grantee and those claiming under her were bound by the agreement as thus completed, although the method adopted for creating the trust may have been irregular; and an assignment of the contract by the real grantee extinguished her remaining interest and vested the assignee with title subject to the equitable mortgage, so that a subsequent judgment against the assignor was not a lien upon the property and the purchaser at execution sale acquired no interest therein.

**Execution sales: UNRECORDED INSTRUMENTS: NOTICE.** A purchaser at an execution sale who acquires no interest in the property by the sale, can not claim the protection of the statute against the effect of an unrecorded instrument of which he had no notice.

**Execution sale: DISCREPANCY IN NAMES.** Where the title to property stood in the name of Lena B. Reeves a sale thereof under a judgment against Belle Reeves would not pass title, in the absence of any proof of identity.

*Appeal from Polk District Court.—HON. HUGH BRENNAN, Judge.*

WEDNESDAY, MARCH 10, 1909.

ACTION to quiet title to a small parcel of land. Defendant claimed an interest in the land as purchaser thereof at sheriff's sale under a judgment in his favor against Belle Reeves, whom he alleged to have been the owner of the property at the date of the recovery of his judgment against her. There was a decree quieting title in defendant against the plaintiff, but allowing plaintiff the right to redeem from defendant's execution sale. Plaintiff appeals.—*Reversed*.

*E. P. Hudson*, for appellant.

*Stewart & Anderson*, for appellee.

McCLAIN, J.—In August, 1905, the tract of land to which this controversy relates belonged to Mrs. Emma E. Domback, and, in pursuance of negotiations through one Davis for the purchase thereof in behalf of Lena B. Reeves, a warranty deed in which said Lena B. Reeves was named as grantee was executed by Mrs. Domback and her husband and delivered to Davis for Mrs. Reeves. For the purpose of raising money with which to pay a portion of the purchase price for the land, the name of Lena B. Reeves as grantee was erased from the deed, and the name Max Lavine was inserted in its place with the knowledge and consent of Lavine and Mrs. Reeves, and the deed was delivered to Lavine, who executed to Mrs. Reeves an instrument in the form of an agreement, signed by both of them, in which Lavine acknowledged the receipt of a warranty deed to the property, and agreed to hold the title thereto in trust for Mrs. Reeves to secure a loan of \$250 advanced by him, and to convey the property to Mrs. Reeves on payment of said loan. This contract was by indorsement on the back thereof assigned by Mrs. Reeves to Davis on December 8, 1905, for the purpose of transferring the title of the property to him,



and he at that time paid to Mrs. Reeves an agreed price, part in cash and part in satisfaction of a claim against her in pursuance of an agreement for the purchase of said property by him. Subsequently, and on December 12, 1905, the defendant in this action recovered judgment in a justice court of Polk County against Belle Reeves, a transcript of which was on the same day filed in the district court of said county. Under execution subsequently issued on this judgment the defendant caused the land in controversy to be levied upon as the property of Belle Reeves, and became a purchaser thereof at execution sale. Still later Davis conveyed the land to plaintiff, who asks to have his title quieted as against any claim of defendant under said sheriff's sale.

The theory of the defendant is that, notwithstanding the change of names in the Domback deed, Mrs. Reeves became a holder of the legal title subject only to an equitable mortgage in favor of Lavine, and that whatever may have been the effect of the assignment to Davis of the written instrument of agreement between her and Lavine as transferring to Davis equitable title to the property, defendant was not chargeable with notice thereof when he became the purchaser at execution sale, and that the rights of Davis and of plaintiff as his grantee are subordinate to the rights of defendant as execution purchaser; but defendant as purchaser at execution sale only acquired the title of Mrs. Reeves, whatever it may have been. At the time defendant's judgment became a general lien upon any property of Mrs. Reeves she had no title to the property subsequently levied upon and sold and continued without title up to the time of the execution sale. The defendant acquired nothing by such sale. *Churchill v. Morse*, 23 Iowa, 229; *Spaan v. Anderson*, 115 Iowa, 121. The deed of the Dombacks reciting Mrs. Reeves as grantee may have been effectual by delivery to

1. **EQUITABLE MORTGAGE:** assignment of mortgagor's interest: execution sale.

Davis as her agent to transfer the legal title to her, but by the arrangement entered into between her and Lavine the title was apparently vested in the latter as trustee, and this apparent title could not thereafter be questioned by Mrs. Reeves or persons claiming under her, so far as the rights of Lavine holding apparent title in trust for Mrs. Reeves were concerned. In other words, Mrs. Reeves and those claiming under her became bound by the arrangement under which legal title was apparently placed in Lavine, and, however irregular may have been the methods resorted to for giving Lavine the title to hold in trust as security for the money advanced by him, the legal effect was to consummate the arrangement which the parties intended to make. As between the parties a formal deed is not essential to the transfer of title. *Walkley v. Clarke*, 107 Iowa, 451. After this arrangement was perfected, the rights of Mrs. Reeves were evidenced by the written instrument of agreement entered into between her and Lavine, and the assignment of this written instrument by her to Davis with the intent and purpose of transferring to Davis for valuable consideration the remaining interest of Mrs. Reeves in the property, whatever it might be, was effectual to divest Mrs. Reeves of any such interest. After this assignment Davis in effect held the legal title subject to Lavine's equitable mortgage. This was the situation of the parties when the defendant recovered his judgment, and it is apparent therefore that such judgment did not become a lien on this property, for Mrs. Reeves had at that time no interest whatever therein either legal or equitable.

As Mrs. Reeves had neither legal nor equitable interest in the property, apparent or real, when defendant's judgment was filed in the district court, and continued without any interest up to the pretended levy and sale under such judgment, defendant acquired nothing thereby. Defendant is

2. EXECUTION  
SALES: unre-  
corded instru-  
ments: notice.

in no situation to claim that he is protected by the recording act against the transfer from Mrs. Reeves to Davis by an instrument not recorded. Defendant must have become the purchaser of some apparent or real interest of Mrs. Reeves to be protected against the effect of an unrecorded instrument of which he had no notice. See Code, section 2925.

We have omitted to make any reference to the fact that defendant's judgment was against Belle Reeves, and the Domback deed named Lena B. Reeves as grantee. In the view which we take of the case it is immaterial whether these names designated the same person. We find nothing in the record to prove their identity, and this discrepancy would in itself be sufficient to defeat defendant's claim.

Plaintiff was entitled to the relief asked in his petition, and the court erred in entering a decree for the defendant.—*Reversed.*

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JOHN C. HUNTER, Appellee, v. LUCY R. PORTER and J. N. RICHEY, Appellants.

**Mortgages:** FORECLOSURE: SUBSEQUENT ACTION ON NOTE: ADJUDICATION. Defendant gave plaintiff a note containing no provision by which the payee might declare it due before maturity, and gave the surety on the note a mortgage to secure him against liability which did provide that in case of default in payment of the note, interest or taxes the whole amount might be declared due. The surety assigned the mortgage to the payee of the note who foreclosed for the full amount for which the surety was liable. *Held*, that as the mortgage did not authorize the payee to declare the note due prior to its maturity the foreclosure of the mortgage was not an adjudication of the right to sue on the note after its maturity.

**Same.** The determination by the Supreme Court in an action for interest on a note, that a judgment in a prior action was not an adjudication that the note was due, is binding in a subsequent action on the note after its maturity, whether right or wrong.

*Appeal from Johnson District Court.*—HON. O. A.  
BYINGTON, Judge.

WEDNESDAY, MARCH 10, 1909.

THIS is an action for balance due on a promissory note against Lucy R. Porter, as principal, and J. N. Richey as surety. The defense is a plea of prior adjudication in a previous action. Judgment for the plaintiff. The defendants appeal.—*Affirmed.*

*Wade, Dutcher & Davis*, for appellants.

*Milton Remley*, for appellee.

EVANS, C. J.—The plaintiff brought this action on August 30, 1905, upon the following promissory note: "2500.00. Lone Tree, Iowa, May 15, 1899. Six years after date, or at the close of any intervening year, at the option of the principals, we or either of us promise to pay to the order of John C. Hunter the sum of two thousand and five hundred dollars for value received, with interest from date, at the rate of six percent, payable annually till paid. Henry E. Porter, Lucy R. Porter. J. N. Richey, Surety. N. B. Richey, Surety."

In his petition the plaintiff conceded to the defendants a credit of \$1,420.04 as of August 4, 1900, being the proceeds of sale of certain mortgaged property, and the further credit of \$322.67, already in judgment under date of March 9, 1905, for delinquent interest. The defendants admitted the execution of the note, and pleaded a prior adjudication as a complete defense. To the answers of the defendants the plaintiff filed a reply. These answers and the reply are based wholly upon the pleadings of record in previous cases, and are quite voluminous. The case was tried in the court below on demurrer. A brief history of

the prior litigation between the parties, and upon which the defense of the prior adjudication is based, can be set forth more concisely than a formal statement of the pleadings. The note in suit was executed by the defendant Lucy R. Porter and her husband as principals, and by the Richeys as sureties, as indicated on the face thereof. On or about the same date Mrs. Porter and her husband executed to the Richeys a real estate mortgage for \$2,500 to secure them against loss by reason of their suretyship. Whether a note was given with the mortgage as a part of the form of security does not appear from this record. The consideration stated in the mortgage was "\$2,500 in hand paid by J. N. Richey and N. B. Richey." The mortgage also stated that it was given for the purpose of securing the Richeys from loss by reason of their signing the note in question, and that it should be void upon payment of such note by the Porters. It also contained this provision: "Default in payment of principal or interest on any note or taxes on the land before delinquent, or failure to keep the buildings insured, as hereinafter stipulated, makes the whole amount of principal and interest due at the option of the holder." Some time later the Richeys assigned to Hunter all their right, title and interest in said mortgage as security for the payment of the note in question. The mortgage in question was a second mortgage, being made subject to a mortgage of \$2,200 on the same real estate. In April, 1900, the mortgagors defaulted in the payment of taxes on the mortgaged real estate, and allowed such taxes to become delinquent. April 6, 1900, the plaintiff, Hunter, paid such delinquent taxes, amounting to \$26.21. Thereupon he declared the mortgage due under the provisions above quoted, and commenced foreclosure proceedings. In such foreclosure action Lucy R. Porter and a number of junior lienholders were all named as parties defendant, but the proceedings purported to be wholly *in rem*, and no personal judg-

ment was asked nor obtained against any defendant. The foreclosure petition contained a statement that the plaintiff "now exercises his option as holder of said mortgage under the stipulation therein contained to declare the whole of said mortgage due and unpaid." There was a decree of foreclosure, foreclosing such mortgage for the full amount for which the Richeys were surety, and for the further sum of \$26.21, taxes paid, and decreeing the lien of the mortgage to such extent to be prior and superior to all claims or liens of the various defendants. Special execution was ordered against the mortgaged premises for the amount of the lien so established. In pursuance of this decree execution was issued against the mortgaged premises, and the same was sold at sheriff's sale. The amount realized from such sale was \$1,420.04, which was applied as a credit upon the note in question on August 4, 1900. On November 7, 1901, the plaintiff brought an action against all the makers of the note to recover past-due interest, averring that they had failed to pay the same. This cause did not come to trial until February 27, 1904, at which time judgment was rendered in favor of the plaintiff in the sum of \$322.67. From that judgment an appeal was taken to this court, where the judgment was affirmed. See *Hunter v. Porter*, 133 Iowa, 391. After the maturity of the note in accordance with its terms, and on August 30, 1905, the plaintiff commenced this action at law to recover the balance due. The defense of prior adjudication is twofold: First. It is contended that the foreclosure proceedings furnished to plaintiff his day in court; that he elected at that time to declare his note due, and, having done so, he was entitled then to his full remedy; that he is therefore barred from maintaining another action. This defense was also set up by the defendant Lucy Porter in the second suit, namely, the suit begun November, 1901, for delinquent interest, and the holding of the court was adverse to such defense in that suit.

Second. It is further contended that if the foreclosure suit did not constitute a prior adjudication, then in any event the second suit, brought to recover delinquent interest, did constitute such prior adjudication, in that the plaintiff could have obtained judgment in that suit for the principal, as well as for the interest. In his reply to the answer the plaintiff contends that the defendants may not again plead the foreclosure suit as a prior adjudication, because that question was fully adjudicated against them in the second suit. It is also contended that the plaintiff's principal note was not due until the expiration of six years from its date, and that it contained no provision authorizing the holder thereof to declare it due for any cause, and that the plaintiff did not in fact declare it to be due, and that he could not have maintained an action upon it at any time prior to its maturity according to its terms. This, in brief, presents the issues between the parties.

I. The contract between the plaintiff and the makers of the note was represented by the note alone. This note contained no provision authorizing the plaintiff to declare it due for any cause whatsoever. It did

1. MORTGAGES:  
foreclosure:  
subsequent  
action on note:  
adjudication.

contain a provision whereby the principal maker of the note could declare it due at the expiration of any year. The mortgage was a contract between the Porters and the Richeys alone; Hunter was not a party to that. At the time of its execution, and while it was held by the Richeys as mortgagees, it is manifest that it did not confer power upon Hunter to declare his note due for any cause prior to six years from its date. The assignment of the mortgage was a contract between the Richeys and Hunter; the Porters were not parties to that contract. It seems plain, therefore, that such assignment could not confer power upon Hunter to declare his note due. The only effect of such assignment was to confer upon Hunter the same rights under such mortgage as the Richeys themselves could exercise. This seems to

have been the theory upon which plaintiff proceeded in the foreclosure of his mortgage. He declared the mortgage due for default in payment of taxes. This the Richeys could have done. He did not declare his note due. This the Richeys could not have done. If the plaintiff had declared his note due, and the makers had assented thereto, such an act would doubtless have been effective as a new contract, but nothing of this kind occurred. We are unable, therefore, to see upon this record that there was ever a time when the plaintiff was legally entitled to call his note due and to demand personal judgment thereon against any maker. The incongruity of this case rests upon the fact that the foreclosure of the mortgage and the sale of the property thereunder had the practical effect of a collection of the debt to the amount realized from the sale of the mortgaged property. It may be that the original decree in the foreclosure suit was erroneous, in that it granted to plaintiff more relief than he was entitled to under the conceded facts as they existed at the time. The decree was not appealed from, and we will not take the occasion to review it now. Certain it is that if the default in payment of taxes had occurred while the Richeys held the mortgage, they would have been entitled to pay the taxes and declare the mortgage due, and to foreclose it and to obtain some relief, even in advance of paying the debt for which they were surety. Under some circumstances courts of equity permit a surety to foreclose a mortgage given for his security, and to apply the proceeds upon the payment of his principal's debt. *Meeker v. Waldron*, 62 Neb. 689 (87 N. W. 539); *Gribben v. Clement*, 141 Iowa, 144. Ordinarily that can only be done when the principal maker is insolvent. Be that as it may, we have no occasion to defend the correctness of the original foreclosure decree. Indeed we are inclined to be skeptical of its correctness under the facts as they now appear to have existed at that time. But a controlling fact



for the purpose of this case is that we can discover no power conferred upon Hunter to declare his note due without the consent and acquiescence of the makers thereof.

II. There is a further conclusive reason to our minds why this defense is not now available to the defendants. Defendants' theory of prior adjudication is based upon

the proposition that the plaintiff declared his  
2. SAME. note due in the foreclosure suit, and that it thereby became due and payable then and there. The proposition necessarily became the basis of the plea of prior adjudication set up in the second suit, namely, the suit for interest begun November, 1901. That case came to this court on appeal. The affirmance here of the judgment below was predicated in large part upon the proposition that the plaintiff's note was not due. This question was therefore adjudicated in that case, and we would be bound by it even though we were now otherwise convinced.

We think the judgment of the lower court was right, and it is therefore *affirmed*.

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MARGARET VOSE, Appellant, v. JENNIE MYOTT, Appellee.

**Husband and wife:** SUPPORT OF HUSBAND: LIABILITY OF WIFE. While the husband is chargeable at common law for the support of his wife, the wife is not liable for the husband's support, except so far as the statute makes the family expenses chargeable against both husband and wife, or either of them; and this statute does not impose upon the wife the expense of her husband's board while absent from their home in contemplation of separation.

*Appeal from Wright District Court.*—HON. C. G. LEE,  
Judge.

WEDNESDAY, MARCH 10, 1909.

ACTION at law to recover for board furnished by

plaintiff to John Myott, husband of the defendant, Jennie Myott. There was a directed verdict and judgment for the defendant, and plaintiff appeals.—*Affirmed*.

*McGrath & Archerd*, for appellant.

*Eugene Schaffter*, for appellee.

WEAVER, J.—The plaintiff and defendant are sisters. For some time prior to the inception of this controversy the former lived at Eagle Grove, Iowa. At one time defendant, with her husband, John Myott, lived at the same place, but later removed to Sioux Falls, S. D. In October or November, 1906, John Myott, being considerably crippled and incapacitated for labor by reason of rheumatism, came to the home of plaintiff in Eagle Grove and asked to be permitted to stay there until he was able to go to work and was informed that plaintiff would board him for \$3.50 per week, and to these terms he assented. He remained with plaintiff until the following March, making but one small payment, and when he left he was owing her about \$45. Later plaintiff demanded payment of the bill from her sister, and, this being refused, she instituted this action. For the purposes of the case it may be conceded, as indeed it must be, that as against John Myott the claim sued upon is reasonable and just; but the material question presented by the appeal is whether it constitutes a just and sufficient ground of recovery against John Myott's wife, a proposition which is by no means so easy of solution.

It goes without saying that at common law the wife is under no legal obligation for the support of her husband. Neither does our statute impose any such obligation in terms. If it is to be found anywhere, it must be by interpretation or construction of Code, section 3165, which makes the "expenses of the family chargeable upon the

property of both husband and wife or of either of them." What may be regarded as "family expenses" is a question which has come up on several occasions, and the phrase has been found sufficiently elastic to include pianos for the daughter (*Smedley v. Felt*, 41 Iowa, 588), watches, chains and rings for the wife (*Marquardt v. Flaughner*, 60 Iowa, 148), and diamond studs for the husband (*Neasham v. McNair*, 103 Iowa, 695). As yet, however the purchase price of lapdogs of royal lineage by the wife, or of aeroplanes by the husband, has not been judicially baptized a "family expense," though the course of recent legal evolution would seem to indicate that the possibilities in this direction are not yet exhausted; but through all the cases there is traceable an effort to confine the term "family expenses" to obligations incurred for something which is intended, nominally at least, for the use or comfort of the collection or personality which we speak of as the family, or for the house or some member of the family, as distinguished from individual or personal expenses not contributing to family convenience, enjoyment or comfort. For instance in the *Smedley* case, *supra*, it is said: "The only criterion which the statute furnishes is: Was the expenditure a family expense? Was it incurred for, on account of, and to be used in the family?" In *Fitzgerald v. McCarty*, 55 Iowa, 702, the trial court having instructed the jury in substantially the language above quoted from the opinion in the *Smedley* case, this court concluded that the rule as thus stated was a little too broad and held that the instruction should have gone further and informed the jury that "it was essential to constitute a family expense that the thing for which the expenditure was incurred should have been used or kept for use in the family." Again, in the diamond stud case, it is said: "The expense is limited to that of the family and must have been incurred for something used therein or kept for the use of, or beneficial thereto." And the pur-

chase of a diamond is brought within this category on the theory that it may fairly be classed as an article of wearing apparel. It is possibly not an undue expansion of the rule thus laid down to say that if a member of the family meet with accident or be suddenly prostrated with sickness when away from home, or if, being sick at home, he goes or is sent to a sanitarium or elsewhere for treatment or benefit to his health, the courts would be disposed to hold the expense thus incurred to be of the class for which both husband and wife are liable; but a consideration of the scope of such liability, if any, is not necessary in this case. Aside from the question of family expense, as such, the wife, as we have already noted, is under no legal liability for her husband's support. *Blackhawk v. Scott*, 111 Iowa, 190. Their obligations as husband and wife are not mutual or coextensive in this respect. The husband is still bound by his common-law obligation for the support of his wife and is entitled to the benefit of her domestic service. *McClintic v. McClintic*, 111 Iowa, 615; *McTighe v. Bringolf*, 42 Iowa, 455; *Lyle v. Gray*, 47 Iowa, 153; *Van Doren v. Marden*, 48 Iowa, 186. And for this reason the husband may be held liable for expenses incurred by the wife under many circumstances which would be wholly insufficient to charge the wife with the expenses of her husband. By no reasonable construction of the statute can the term "family expense" be stretched to include the traveling expenses, hotel bills, and board bills of the husband, unless it may be under extraordinary circumstances such as we have above suggested. If there be any exceptions to this rule, we are quite clear that the case before us does not present one of them. It is shown by the evidence of several witnesses that when defendant's husband left the home in Sioux Falls in 1906, and came to Eagle Grove, it was in contemplation of a separation from his wife, and, except a brief visit of a few days with her in the following

summer, they have ever since lived apart. While he was suffering from rheumatism at the time of his departure, there is nothing to indicate any reasonable necessity for the journey for the purpose of medical treatment, or that such was in fact the motive which led to his going. If the plaintiff may recover for his board from November, 1906, to March, 1907, then each person who has since that time given him shelter or food may also recover from her. This, we think, would be giving to the statute an effect far beyond the contemplation of the Legislature in its enactment. The facts developed on the trial were not sufficient to sustain a finding in the plaintiff's favor, and there was no error in directing a verdict for the defendant.

The judgment of the district court is therefore *affirmed*.

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FRANK POAGE, Appellant, v. GRANT TOWNSHIP DITCH  
AND DRAINAGE DISTRICT No. 5, and STORY COUNTY,  
IOWA.

**Drainage: ASSESSMENT OF BENEFITS: APPEAL: SERVICE OF NOTICE.**

On appeal from an order of the supervisors fixing an assessment of benefits for drainage purposes, the notice must be served on the first four petitioners for the drain, and upon service of notice upon the county auditor only, the appeal should be dismissed.

*Appeal from Story District Court.*—HON. W. D. EVANS,  
Judge.

WEDNESDAY, MARCH 10, 1909.

THE plaintiff was assessed for benefits alleged to have been received by him from the establishment of a drainage ditch and attempted an appeal to the district court,

but his appeal was dismissed, and, from that judgment of the district court, he appeals to this court.—*Affirmed.*

*D. J. Vinje and Bert B. Welty*, for appellant.

*I. W. Douglas and Binford & Farber*, for appellees.

SHERWIN, J.—When the proceedings to establish the ditch were before the board of supervisors of Story County, the appellant filed objections thereto which were considered and overruled, and on December 3, 1906, he served on the auditor of the county a notice of appeal from the assessment of the board to the district court of Story County. This notice of appeal was served on the county auditor only, and no appearance has been made for the district or for any of the petitioners for the ditch. The appellee county filed a motion to dismiss the appeal on the ground that it had not been taken and perfected as by law provided, and that the district court had not acquired jurisdiction of either the parties or the subject-matter of the action. This motion was sustained and the correctness of the court's ruling thereon presents the only question for our determination.

The law in force at the time an attempt was made to appeal to the district court was Code, section 1947, which provided that an appeal might be taken to the district court from an order of the board of supervisors in fixing the assessment upon lands in the same manner that appeals may be taken in the location of roads and within the same time. We construed this statute in connection with the roads statute therein referred to in *Henderson v. Calhoun County*, 129 Iowa, 119, and therein held adversely to the appellant's contention herein, and that case is controlling here. It is true that in the *Henderson* case the appeal was from an award of damages, while here it is from an assessment of benefits. But this does not change the rule

or the necessity therefor announced in the *Henderson* case. All petitioners for a ditch were and are necessarily affected by both the assessment of damages and the assessment of benefits. Code, section 1946, required that an equitable apportionment of the costs, expenses, cost of construction, fees, and damages assessed for the construction of any ditch or improvement should be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby in proportion to the benefit to each of them and "levied upon the lands of the owners so benefited in said proportions." It is evident that the petitioners for the improvement were under this section as deeply interested in the apportionment or assessment of benefits as they were in the question of the damages to be allowed thereunder, and that the necessity of notice to the first four petitioners was as great where the benefits assessed were questioned as it was in the *Henderson* case. Section 1946 seems also to have recognized the necessity of bringing all parties in for the adjustment of their relative rights because it required notice of the hearing to be served upon the owner of each tract of land or lot involved in the proceedings. *Yockey v. County*, 130 Iowa, 412.

As we have heretofore said, the *Henderson* case rules this case, and the judgment must be, and it is, *affirmed*.

EVANS, C. J., took no part.

141	512
144	170

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D. B. ASHENFELTER, Trustee, Appellee, v. E. H. SEILING and ELLA SEILING, Appellants, and W. J. SCHANDELMEIER and others, Appellees.

**Taxation: REDEMPTION: PROOF OF SERVICE OF NOTICE: DUTY OF TREASURER.** Upon the return of service of notice of the expiration of the period of redemption from a tax sale, it becomes the mandatory duty of the treasurer to forthwith report the same

in writing to the auditor, that he may know the exact time when the right of redemption expires; and until this is done he may rightfully receive redemption from those entitled to redeem, and especially those who have not been served with notice in due time.

**Same: PROOF OF SERVICE OF NOTICE: PRESUMPTION.** The filing of  
2 proof of service of a redemption notice with the treasurer is only presumptive evidence of completed service, and where there has been a material omission of any required step by which the right of redemption may be cut off this presumption is overcome; as where the treasurer neglects to file proof of service of notice with the auditor as required by statute.

**Same: CONSTRUCTION OF STATUTES.** The right of redemption from  
3 a tax sale will be liberally construed in favor of the tax payer.

**Same: SERVICE OF NOTICE OF REDEMPTION: PROOF OF SERVICE.** The  
4 affidavit of service of a redemption notice must show at whose direction the service was made, and the notice must be served upon the party in possession to support a tax deed.

*Appeal from Boone District Court.*—HON. W. D. EVANS,  
Judge.

WEDNESDAY, MARCH 10, 1909.

THE material facts are stated in the opinion.—*Affirmed.*

*Dyer & Hull*, for appellants.

*Goodykoontz & Mahoney*, for D. B. Ashenfelter.  
*D. G. Baker*, for W. J. Schandelmeier.

WEAVER, J.—Some ten years prior to the commencement of this action one Jacob Schandelmeier died seised of two lots in the city of Boone, on one of which was a house occupied by himself and his family as a home. He left a will, by the terms of which his widow was given a life estate in said property, with remainder over to his sons, William J. and John G. The two lots, which ad-

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joined, were separately assessed for the taxes of the year 1902, and such taxes, with certain special assessments, becoming delinquent, they were sold in bulk to the defendant T. E. Means, at the treasurer's sale held in December, 1903. On September 11, 1906, Means served notice of the expiration of the period of redemption upon the widow, Elizabeth, but served no notice upon the son John G. Schandelmeier, who occupied the premises with her. It should also be said in this connection that the said John G. is ordinarily known as George Schandelmeier, and that, as shown by the tax sale record, the property in question was taxed to "George G. Schandelmeier," while the special assessment described the owner as "the estate of George Schandelmeier." As already stated, the notice of expiration was served upon Elizabeth alone, and return thereof was on the same day filed with the county treasurer, but no report or statement of such notice or service thereof was ever made by the treasurer to the county auditor, as required by Code, section 1341, nor was any statement or memorandum thereof ever entered in the auditor's salebook against the description of said lots. At this time the remainder in said property, owned by William J. Schandelmeier, had become incumbered by mortgage, made and executed by him to one Otto Hile, and several judgments against John G. or George Schandelmeier were apparent liens upon his remainder. The mortgagee, Hile, and the holders of said judgment liens united in transferring their several claims in trust to the plaintiff, who on December 11, 1906, went to the office of the county auditor and redeemed the property from the tax sales, receiving the usual certificate of redemption, signed by said auditor and countersigned by the county treasurer. Record of such redemption was at the same time entered upon the books of both the auditor and the treasurer. On the following day, December 12, 1906, Means, the holder of the tax sale certificate, appeared before the treasurer,

and, refusing to recognize the redemption, demanded a deed. To this demand the treasurer acceded, and, ignoring the redemption made on the previous day, executed and delivered a tax deed to Means, who thereafter conveyed to the defendant E. H. Seiling, informing him of the circumstances under which the tax deed had been issued. On January 3, 1907, the plaintiff instituted this action in equity to foreclose the mortgage assigned to him by Hile, and impleaded therein as defendants the widow and sons of Jacob Schandelmeier, together with Means and his grantee, Seiling. The petition alleges the redemption of the property from taxes, and asks that the mortgage be given preference over all claims asserted under the tax sale. The son William J. Schandelmeier also appears, and by cross-petition asks that the tax deed be decreed to be void. The defendant Seiling asserts and relies upon the validity and sufficiency of the tax deed made to his grantor, Means. The trial court found for the plaintiff, and cross-petitioner, held the tax deed to be void, and entered a decree for the relief demanded. Seiling appeals.

Several issues involving the validity of the tax sale and deed are presented by the pleadings and argued by counsel; but, in view of our conclusion as to the effect of redemption made by the plaintiff, we shall

1. TAXATION:  
redemption:  
proof of  
service of  
notice: duty  
of treasurer.

not enter upon any consideration of the regularity of the tax sale. The statute, Code section 1341, provides that after the expiration of two years and nine months from the date of sale the holder of a certificate of purchase may serve upon the person in possession of the land, and also upon the person in whose name it is taxed, a notice to the effect that the time of redemption will expire unless such redemption be made within ninety days from the completed service of such notice. It further provides that proper return of the service of such notice shall be filed with the treasurer, and entered by him upon

the salebook opposite the entry of sale, and that such record shall be presumptive evidence of completed service. It still further provides as follows: "The treasurer shall upon the filing of the proof of service and statement of costs forthwith report the same in writing to the auditor and shall enter it in the salebook against the proper tract of real estate." The purpose of this latter proposition is quite apparent. The auditor is the officer, and the only officer, authorized to permit or receive redemptions made from tax sales. It is he to whom the landowner desiring to redeem must apply to ascertain the amount required to redeem, and to his records he must look to determine whether the apparent right to redeem exists. It is therefore a matter of vital importance that the officer upon whom this power and duty are imposed shall know, and that his books shall disclose, at what time the period of redemption will expire. Under our former statute, by which the period was made to expire in all cases at the end of three years from the date of sale, the auditor's record of sale answered this purpose, and after the expiration of three years the authority of that officer to accept redemption ceased. *Pearson v. Robinson*, 44 Iowa, 413. But the amendment of the tax statute which preserves the right of redemption until cut off by a notice duly served would lead to endless confusion and litigation if the period of redemption could be terminated without information thereof being given to the only officer authorized to accept redemption. To avoid such result the statute makes it the duty of the treasurer, when return of service of notice is made to him, to forthwith make written report thereof to the auditor, and we think it follows of necessity that until this is done the auditor is justified in assuming that the right of redemption has not expired, and may rightfully receive redemption at the hands of the owner or lienholder; at least from such redemptioners as have not been personally served with notice in due time.

As opposed to this view our attention is called to that part of the Code section above cited, which provides that the filing of the proof of service with the treasurer, and entering thereof upon the treasurer's sale

2. SAME: proof of service of notice: presumption.

record, shall be presumptive evidence of completed service of said notice, but this provision does not in our judgment justify the conclusion counsel seek to draw from it. Such record is presumptive evidence only, and if there be a material omission in any of the required steps by which the period of redemption may be cut off, the presumption arising from the treasurer's record is overcome. It is, as we have already seen, the duty of the treasurer on receiving such proof to act at once, forthwith, in order that the auditor shall be promptly advised of the time when the right of redemption will expire. This is as much a part of the treasurer's duty as it is to receive and make entry of the proof of service on the proper owner. It is not merely directory; it is mandatory.

The right and authority of the State to seize and sell valuable property for the payment of a relatively small tax, while necessary, is often so oppressive in its results

3. SAME: construction of statutes.

that we are bound to construe the right of redemption with all reasonable liberality, and hold the person who seeks to foreclose it to very substantial compliance with all of the provisions which have been enacted for its protection. *Burton v. Hintrager*, 18 Iowa, 348; *Penn v. Clemans*, 19 Iowa, 372; *Rice v. Nelson*, 27 Iowa, 148; *Foster v. Bowan*, 55 Iowa, 237; *Burke v. Cutler*, 78 Iowa, 299.

There are other reasons why the redemption in this instance may properly be held to have been made in due time. The affidavit of the holder of

4. SAME: service of redemption: proof of service.

the tax certificate to the service of notice upon Elizabeth Schandelmeyer does not conform to the statute, which requires it to show at whose di-

rection the service was made. Code, section 1441. We have held that obedience to this requirement is necessary before the right of redemption is lost to the property owner. *Grimes v. Ellyson*, 130 Iowa, 286. Again, the statute requires that the notice shall be served upon the person in possession of the land and upon the person in whose name the land is taxed. Appellant's abstract shows that the land was taxed for the year 1902 in the name of George G. Schandelmeier, and it is also shown that George Schandelmeier was living upon the property. The failure, therefore, to serve notice upon him is, in our judgment, a sufficient reason for holding the tax deed invalid.

There are still other apparently insuperable objections to said deed disclosed by the record, but we shall not stop to discuss them. Moreover, the redemption having been allowed and made, and record thereof having been duly entered upon the books of both auditor and treasurer, even though such redemption was improvidently permitted or was made, under circumstances upon which a court of equity would hold it invalid or ineffective, there is very grave doubt whether the treasurer had any right or authority to ignore it and issue a deed as if no redemption had been made, but this question not having been argued by counsel, we shall not undertake to decide it. See *Burchardt v. Scofield*, 141 Iowa, 336.

We have sufficiently indicated our view that the decree of the district court is correct, and it is *affirmed*.

EVANS, J., taking no part.

CHRISTINE KLUMB, Appellant, v. IOWA STATE TRAVELING  
MEN'S ASSOCIATION.

**Accident Insurance:** CAUSE OF DEATH: PRESUMPTION. Where the  
1 cause of death is an issue the presumption is against suicide.

**Same:** CIRCUMSTANTIAL EVIDENCE: SUFFICIENCY. That the circum-  
2 stances relied upon in proof of an accidental death may furnish  
any evidence of the conclusion sought to be drawn therefrom,  
the facts which the evidence tends to prove must be of such  
nature and so related to each other that the conclusion is the  
only one which can fairly and reasonably be drawn; it is not  
enough if they are consistent therewith, if equally consistent with  
some other conclusion. Evidence that the death of insured was  
due to a stray bullet is held insufficient to take the issue to the  
jury.

*Appeal from Polk District Court.*—HON. JESSE A. MIL-  
LER, Judge.

WEDNESDAY, MARCH 10, 1909.

ACTION on certificate of accident insurance in the  
defendant association. At the conclusion of plaintiff's  
evidence, the court on defendant's motion directed a ver-  
dict in its favor, and from the judgment on this verdict  
plaintiff appeals.—*Affirmed.*

*Parrish & Dowell* and *Parsons & Parsons*, for ap-  
pellant.

*Sullivan & Sullivan*, for appellee.

McCLAIN, J.—Plaintiff sues as beneficiary under a  
certificate of accident insurance in the defendant asso-

ciation issued to her husband, John Jacob Carl Klumb, a member of said association, and alleges that the death of her husband occurred by violent, external, and accidental means within the language of the certificate entitling her to the benefits specified on the happening of such an event. It is conceded that plaintiff had the burden of proving the death of her husband by such an accident as described in the certificate, and we proceed to state briefly in narrative form every fact relied upon by the appellant as tending to show such accidental death.

The decedent, a cigar manufacturer, forty-two years of age, who had previously been in good health; left his home in Des Moines on the morning of August 8, 1906, at about seven o'clock, in good spirits. He was last seen about half past two o'clock on the afternoon of that day on Locust Street, in Des Moines, where he engaged in a conversation with a friend with reference to prospective arrangements for holding the usual annual picnic of the German Turners Society at some place along the Des Moines River, instead of at Ashworth's Grove or at Clegg's Woods, in the western part of the city, along the Valley Junction Interurban Line, where such picnics had usually been held, and in this conversation he said he was going out that afternoon to Clegg's Woods and Ashworth's Grove to see what condition the grounds were in at that time. The tract of land known as Clegg's Woods lies on both sides of the Valley Junction track about a half mile west of Ingersoll Park, and Ashworth's Grove is just north and west thereof. These tracts lie west and south from the golf links of the Des Moines Country Club, from which they are separated by a road. On the 24th day of September following the body of deceased was found in a ravine in the woods west of the golf grounds above referred to at a secluded place difficult of access. The coroner was called, and found the

body apparently as it had lain for some time undisturbed, close to the edge of a little stream and near the foot of a tree. The body had evidently been there during a hard rain, and a part of it submerged by the stream. It was badly decomposed, the whole of the abdomen was practically gone, the thoracic cavity was denuded of all tissue, leaving the ribs standing out. The body looked, as though it might have been macerated and then kiln dried. The clothing on the body consisted of a light summer coat, a soft shirt, and pantaloons. It could not be determined on examination whether there had been an undershirt. In the shirt there was a round hole to the left of the median line and about an inch or two below the apex of the heart, a hole into which as a witness testified he could insert the end of his little finger. This hole as the witness said was about the size of a hole which would be made by a .32 or .38 caliber pistol bullet. There was no signs of powder marks. The hole was such as might have been produced by worms, flies, or other insects or crickets. There was no corresponding hole in the coat or shirt such as would have been produced if the bullet had passed through the body and come out at the back, nor was there any indication of a bullet having struck any of the bony structure of the body, nor was any bullet found in the body. On the body was found a watch and a small sum of money, and a half-pint whisky flask. The shirt, as testified by plaintiff, had been ironed the day before deceased put it on, the morning of his disappearance, was a good shirt without holes, and had not often been worn.

The theory of the appellant is that the death of deceased was due to a bullet penetrating a vital part of his body, and that this was a stray bullet from a pistol or small rifle for there are presumptions against felonious homicide and suicide. *Preferred Acci. Ins. Co. v. Field-*



ing, 35 Colo. 19 (83 Pac. 1013, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198; 9 Am. & Eng.

1. ACCIDENT IN-  
SURANCE:  
cause of  
death:  
presumption. Ann. Cas. 946, and note); *Travelers Ins. Co. v. McConkey*, 127 U. S. 661 (8 Sup. Ct. 1360, 32 L. Ed. 308); *Taylor v. Pacific*

*Mut. L. Ins. Co.*, 110 Iowa, 621.

The only evidence tending to support this theory, aside from the fact of the hole in the shirt of deceased, consisted of testimony of two street car employees, who during the summer of 1906 ran cars on the Valley Junction Interurban Line which passed within about a quarter of a mile of the place where the body of deceased was found, that during that summer hunters with guns frequently got off the cars, and went northwest into the woods in which the body was found, and that hunters were in there nearly every day after squirrels. On cross-examination neither of these witnesses was able to say that he remembered such hunting during the month of August.

2. SAME:  
circumstantial  
evidence:  
sufficiency. We think that the evidence was not sufficient to take the case to the jury on their theory. The circumstances proven go no further in probative effect than to suggest the possibility that a bullet penetrated the body of deceased causing the hole in his shirt, and that the resulting wound produced death, and the further possibility that such bullet was accidentally fired, and not with the intention that deceased should be struck thereby. No weapon was found near the body, nor was there any other suggestion that a bullet had penetrated the body of deceased causing his death, save that indicated by the round hole in his shirt of about such size as that which might have been caused by a bullet. While it may not be safe to say as a rule of law that inference can not be added to inference for the purpose of proving a fact

by circumstantial evidence, yet it is true that every additional inference necessary in connecting the supposed cause with the result lessens the weight to be given to the circumstantial evidence, and the inference may become so remote that the court is required to say as a matter of law that the proposed evidence is insufficient to go to the jury. "It has been found to be a wise and safe rule to require circumstantial evidence to go so close to the fact to be proved that it must be the immediate and direct inference therefrom. Any other rule would result in great uncertainty. If the ultimate fact should be drawn from intervening inferential facts, the probability of its correctness would be much weakened. It would be a probability based upon a probability. The law will not tolerate such uncertainty." *Supreme Council v. Boyle*, 10 Ind. App. 301 (37 N. E. 1105). And see Wigmore, Evidence, section 30. It is a general rule in determining whether the circumstances relied upon furnish any evidence whatever of the conclusion sought to be drawn therefrom that the facts which the evidence tends to establish must be of such nature and so related to each other that the conclusion is the only one that can fairly or reasonably be so drawn. It is not sufficient that they are consistent with such conclusion if they are equally consistent with some other conclusion. *Gibson v. Iowa Central R. Co.*, 136 Iowa, 415; *Neal v. Chicago, R. I. & P. R. Co.*, 129 Iowa, 5; *Kling v. Chicago, M. & St. P. R. Co.*, 115 Iowa, 133; *Kennedy v. Chicago & N. W. R. Co.*, 90 Iowa, 754; *Wheelan v. Chicago, M. & St. P. R. Co.*, 85 Iowa, 167; *Daugherty v. Chicago, M. & St. P. R. Co.*, 87 Iowa, 276; *Asbach v. Chicago, B. & Q. R. Co.*, 74 Iowa, 248. The cases relied upon for appellant are not inconsistent with this statement of the rule. In *Huggard v. Glucose Sugar Refining Co.*, 132 Iowa, 724, there was a presumption to assist the inference which was sought

to be drawn from circumstantial evidence, and in *Bryce v. Chicago, M. & St. P. R. Co.*, 129 Iowa, 342, it was held that the rule was not to be applied to each particular one of the circumstances relied upon together as constituting evidence of the fact to be established, but that all should be considered in determining their probative force.

Taking all the circumstances which the testimony in this case tends to establish, there was no better reason to attribute the death of deceased to a wound inflicted by a stray bullet than to attribute it to some of the maladies which, as is generally known, sometimes produce death in cases of persons apparently in good health.

The judgment is *affirmed*.

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141 524  
144 417

STATE OF IOWA v. JOHN HETLAND, Appellant.

**Rape:** CORROBORATION. There must be some evidence corroborating  
1 the prosecutrix and tending to connect the defendant with the  
commission of the offense, to justify conviction for assault to  
commit rape, but its sufficiency is a question for the jury.

**Same.** The denial by a defendant charged with assault with intent to  
2 commit rape that he used any force is ground for the inference  
that he attempted to have intercourse with prosecutrix and would  
tend to connect him with the offense, even though not corroborative  
of her claim that force was used: and the flight of defendant  
knowing that he was charged with the crime would tend to connect  
him therewith.

**Same:** FLIGHT: INSTRUCTION. An instruction that if defendant,  
3 knowing he was accused of the crime of assault with intent to  
commit rape, fled to retard or avoid prosecution the fact of his  
flight should be accepted as evidence tending to connect him with  
the offense, was not objectionable as ignoring his claim that he did  
not flee because of the accusation.

**Instruction:** REASONABLE DOUBT. An instruction that if the jury  
4 found beyond a reasonable doubt that the crime of assault with  
intent to commit rape was committed by some one, that if de-  
fendant was the person making the assault, and that he did so

with intent to have sexual intercourse with prosecutrix against her will he should be convicted, was not objectionable as failing to require a finding beyond a reasonable doubt that defendant was the assailant and that he intended to commit the crime of rape, where the jury was plainly told that unless proof thereof was beyond a reasonable doubt he should not be convicted of the crime charged.

**Flight:** RIGHTS OF ACCUSED ADMITTED TO BAIL: EVIDENCE. While ordinarily an accused who has given bail may go where he chooses if his bondsmen do not object, still the fact that he has given bail will not preclude proof of flight, if to avoid or retard prosecution. Evidence held to show that defendant admitted to bail fled to retard or avoid prosecution.

*Appeal from Wright District Court,*—HON. W. D. EVANS,  
Judge.

WEDNESDAY, MARCH 10, 1909.

THE defendant was convicted of assault with intent to rape, and appeals.—*Affirmed.*

*W. E. Bullard, T. D. Healy, and Healy & Healy,*  
for appellant.

*H. W. Byers, Attorney General, and C. W. Lyon,*  
Assistant Attorney General, for the State.

LADD, J.—The accused was the pastor of the Norwegian Lutheran Church at Belmont. His wife was away on a visit, and while in Des Moines he employed Senna Oklund to do his housework, stipulating to pay her railroad fare to Belmont and \$4 per week for her services. They reached that place in the afternoon of April 12, 1906, and she was assigned to the east room of the upper story of the house, to which her trunk was taken. After the evening meal, which she had prepared, defendant's son departed with a neighbor's boy to stay at the latter's home over night. Prosecutrix completed her work and

was invited by defendant into the sitting room. She declined, with the statement that she had better stay in the kitchen as she was suffering from a cold. He suggested a little whisky and warm water, and, being answered "that maybe it would be a good thing," got some for her and took a little himself. Shortly thereafter and at about nine o'clock she retired to her bedroom, but, as there was no key, did not lock the door. Scarcely had she extinguished the light and gotten into bed, when the accused, as she testified, entered the room and got into bed with her, saying that he meant to sleep with her, as he had no wife, and that "there should not be any baby of it." It is unnecessary to describe the struggle which followed, save to say that she escaped from the bed and also from the house, notwithstanding his efforts to restrain and overcome her, and, in her nightclothes, reached an outside closet with him still pursuing. She was able to exclude him by throwing herself against the door, and, after some parley, induced him to bring her shoes and some clothing, and, upon his return to the house, she fled to the home of one Johnson, some sixty rods distant, and immediately made complaint.

Her testimony was sufficient to establish the commission of the assault as alleged, but to justify the conviction of the defendant this must have been corroborated by other evidence tending to connect defendant with the commission of the crime.

1. RAPE:  
corroboration.

The quantum of such evidence is not otherwise prescribed by law. If there was any evidence tending to strengthen or corroborate the testimony of prosecutrix, and thereby to single or point out the defendant as the perpetrator of the offense, its sufficiency was for the jury. *State v. Ralston*, 139 Iowa, 44; *State v. Stevens*, 133 Iowa, 684; *State v. Norris*, 127 Iowa, 683; *State v. Carnagy*, 106 Iowa, 490.

Was there such evidence? We think there were three circumstances which tended to corroborate the prosecutrix: (1) Thompson testified that in soliciting him to sign a bail bond defendant said in reference

2. SAME. to the charge that he had used no force; (2) Mrs. Hextal testified that, in speaking of the same charge, defendant declared that he had never used any force or power on prosecutrix; and (3) the alleged flight of the defendant. If, as the jury might have found, the defendant made the statements to Thompson and Mrs. Hextal, it might have been inferred therefrom by the jury that he admitted an attempt to have intercourse with prosecutrix, though without the exertion of force. This does not seem to be controverted by counsel for appellant; but they insist that, even if this were so, such admission would not constitute corroborative evidence such as contemplated by the statute. Their thought is that the use of force must be corroborated, and reliance is put on *State v. Cassidy*, 85 Iowa, 145. The court, in what was there said, had reference to the sufficiency of the evidence as a whole to justify conviction. This is evident from the citation of *State v. McLaughlin*, 44 Iowa, 82, where it was said that a confession of having had sexual intercourse at the time alleged might be considered as corroborative evidence. In *State v. Forysthe*, 99 Iowa, 1, it was again decided that evidence of defendant's admissions that he had had intercourse with prosecutrix was evidence tending to connect the defendant with the commission of the offense. See, also, *State v. Sigg*, 80 Iowa, 746. The corroboration exacted is not of the commission of the offense, but of the accused's connection therewith, and, if it is made to appear that he had admitted having sexual intercourse or attempted it at about the time alleged, this would tend to point him out as the perpetrator of the offense, which might be established by

the evidence of the prosecutrix alone. If then it might be inferred from what defendant said to the two witnesses that he admitted having attempted intercourse with prosecutrix without force, this might have been found to be sufficient corroboration. So, too, if the jury found that he fled the country to avoid or retard prosecution. *State v. Ralston*, 139 Iowa, 44. The ground for receiving such evidence is that an inference of defendant's guilt of the crime charged may be drawn therefrom. If so, its tendency is to point out the guilty person. We are of opinion that the evidence was sufficient to carry the case to the jury.

II. In the sixth paragraph of the charge the court instructed the jury with respect to proof of flight, and that: "If the offense was committed, and prosecutrix charged him therewith, and defendant knew

3. SAME: flight: instruction. that she so accused him, and while so knowing, thereupon fled from the vicinity for the purpose of avoiding or retarding prosecution in the case, then such flight is admitted in law as a circumstance against him, and it is to be received as evidence tending to connect him with the commission of the crime charged. In such case this is corroborative evidence within the meaning of the law tending to connect the defendant with the commission of the crime charged. The credibility, weight, and sufficiency of it as such corroborative evidence is a question solely for your determination in the light of all the evidence in the case." This instruction is criticised for that (1) it treats evidence of flight alone as furnishing sufficient corroboration, and (2) because it ignores, as is said, the explanation of the defendant. As previously remarked, the theory upon which such evidence is received is that the accused has departed because of his consciousness of guilt, and manifestly the probative force of such an inference is its tendency to show that

the accused had committed the particular offense. Its effect then tends to point out the accused as the guilty person. Its sufficiency was left to the jury, and properly so; but it is said that the instruction excluded the explanation given by the accused. He testified that some days after his arrest for this offense he "heard through a friend that my enemies were disappointed because I secured bond. They told me they were now trying to get in another case so they could send me to jail. I learned this before I left. I intended to come back and stand trial in the case in which I had given the bond." Later another charge was presented to the grand jury, which returned an indictment, and of which he was subsequently acquitted. The effect of this explanation was to deny that he had fled on account of the accusation made in this case, and the court, as plainly appears in the instruction quoted, excluded any probative force thereof in the absence of a finding that he had fled for the purpose of avoiding or retarding prosecution in this case. See *State v. Poe*, 123 Iowa, 118. This gave the accused the benefit of the only explanation undertaken.

III. The jury was told in the twelfth instruction that if they found beyond a reasonable doubt that the offense was committed by some one, and if they further found that the defendant was the person making the assault, and that he did so with intent to have sexual intercourse with prosecutrix by force and against her will, he should be convicted. It will be noted that the last two findings are not exacted beyond reasonable doubt, but further on the jury were advised that, if they entertained a reasonable doubt whether he intended to commit the crime of rape, he should not be convicted of a higher offense than assault and battery, and that in that event he might be convicted of the latter offense if it were found beyond reasonable

4. INSTRUCTION:  
reasonable  
doubt.



doubt that he laid violent hands upon prosecutrix; and then followed a similar statement as to assault, and that, if there was a reasonable doubt as to whether an unlawful assault had been committed, a verdict of not guilty should be returned. When considered as a whole, this instruction was not subject to a construction which would authorize a conviction without a finding that he was the person who committed the offense and with the intent charged beyond a reasonable doubt. While this qualification of these findings was not exacted in the fore part of the instruction, the jury later was plainly told that, unless the proof thereof was beyond reasonable doubt, he should not be convicted of the crime alleged. Moreover, in the third instruction the jury had been definitely instructed that to convict each of these findings must be beyond reasonable doubt. The criticism is without merit.

IV. Appellant contends there was no evidence of flight. This is on the theory that, as bail bond was executed, he was entitled to go where he pleased, if his bondsmen did not object. Ordinarily this may be so, especially when the accused submits himself to the jurisdiction of the court upon the return of an indictment; but this does not preclude proof of flight, notwithstanding a bond has been given, if this is to avoid or retard prosecution. *Saylor v. Com.* 22 Ky. Laws, 472 (57 S. W. 614); *State v. Wingfield*, 34 La. Ann. 1200; *State v. Lee*, 17 Or. 488 (21 Pac. 455); *Porter v. State*, 2 Ind. 435. The defendant had undertaken to appear at the next term of court, which convened April 23, 1906, and submit to its orders. Instead, he left the county on April 22d, and on the following day, that on which court convened, proceeded to Britt, and from there went to Canada by way of St. Paul and Minneapolis at 2 o'clock on the morning of April 24th. On the next day an indictment was

5. FLIGHT: rights  
of accused  
admitted to  
bail: evidence.

returned in this case, and he was so advised upon his arrival in St. Paul, and another indictment also was returned charging him with an assault on a girl under the age of consent. Upon being advised, he went to Minneapolis, and then on to Winnipeg and different places in Canada. From Winnipeg he wrote to Anderson under an assumed name April 27th, saying, among other things: "I understood it would be difficult with bonds, so I thought it best to stay away awhile. Is it Mr. Larson that made complaint in case number two? There has been no action? Has anybody sent for Mrs. Hetland, and has she come? What is the people's opinion about the case, and is there any talk about settling the case outside of court? You must not let anybody know I am here. Should I be in danger you must telegraph immediately. Burn this letter and save the address until a week from today my address will be Watson, Saskatchewan, Canada. Over a week from now, address will be North Battleford, Saskatchewan, Canada." He testified that his attorney had said to him the trial would not occur until October, and that he would appear. The day of leaving Belmont he had arranged with Mrs. Hextal to keep his sons and told her to write his wife if he should not come back. Ole Thompson saw him in Minneapolis at a church conference June 19, 1906, when he inquired if Thompson thought any one there would report him, and said he thought it best for him to go back and have a trial, else it would hang over him always. Aconger was at the same conference, and to him defendant said that, if any one would send word to the sheriff at Belmont, he could or would take the first train out of town. Jacob Thompson testified that defendant had said to him after his arrest that Sheriff Brown had a good reason for saying he did not want him when he was in St. Paul, as he could not find him, for he had stayed outside the town. It

appeared that the sheriff had gone there to serve the bench warrants immediately upon their issuance, but defendant was not arrested until July 13, 1906. This happened in Mason City when passing through on his way to Chicago. These circumstances have been detailed as the best answer to the suggestion of want of evidence of flight. At the time fixed for his appearance in the district court, he was on the way to a foreign country. He was in fact fleeing from this prosecution, even though he testified that he intended to return, and that his flight was to avoid going to jail on the other charge. The jury might have found that his flight was from either or both charges, and the weight to be given the evidence thereof was for the jury.

Appellant relies somewhat on *People v. McKeon*, 64 Hun, 504 (19 N. Y. Supp. 486), wherein the accused attempted to escape from jail, in which he was confined on two charges; the court holding evidence thereof should have been excluded on the ground that it was impossible to say which offense he was trying to avoid. The decision was by an intermediate court, and, as we think, is unsound. Such evidence should be received subject to explanation, and the jury allowed to determine, in view of all the circumstances, the weight it is entitled to receive.

There was no error in the rulings on the admissibility of evidence, and the material allegations of the crime were stated with sufficient clearness to the jury.—*Affirmed.*

EVANS, C. J., took no part.

L. M. RUSSELL, Plaintiff, v. D. M. ANDERSON,  
Judge.

**Certiorari:** CONTEMPT: REVIEW OF EVIDENCE. *Certiorari* is not primarily for the purpose of reviewing the rulings of the trial judge, but is to determine whether the court acted without authority in making the order complained of; so that if there is competent evidence to support a judgment for contempt the order will be sustained regardless of the admission of other incompetent evidence. In contempt proceedings to punish defendant for selling or keeping for sale intoxicating liquors in violation of law, the evidence is reviewed and held sufficient to support conviction.

*Certiorari from Davis District Court.*

THURSDAY, MARCH 11, 1909.

THIS is an original proceeding by certiorari to review the action of defendant, as judge of the District Court of Davis County, in adjudging the plaintiff guilty of contempt in violating a decree secured in a proceeding by injunction to restrain him from selling or keeping for sale any intoxicating liquors in violation of law within that judicial district, the charge in the proceeding for contempt being that he had illegally kept and sold intoxicating liquors in his place of business in the city of Bloomfield. After hearing the evidence, the court found defendant guilty of the contempt charged, and imposed upon him a fine of \$300 and costs. Writ *discharged*.

*Jacques & Jacques*, for plaintiff.

No appearance for appellee.

McCLAIN, J.—The record shows that the defendant

in the contempt proceeding (plaintiff here) was engaged in conducting a restaurant or eating house in the city of Bloomfield, and that on searching his place under a warrant the officers of the law found a case of beer under the counter and from forty to sixty bottles of the same beverage in the ice chest. Evidence was received over the defendant's objection tending to show that the place had a bad reputation as to the sale of intoxicating liquors there as a beverage, and of this the defendant complains as constituting error.

We are not called upon in the present case to pass upon the admissibility of the evidence. The proceeding before us is not one primarily to review rulings of the defendant as judge. If there is other sufficient evidence to support the action of the court, it should be sustained, regardless of any error in the receipt of the evidence of reputation. The proceeding by certiorari has for its object an investigation of the question whether the court acted without jurisdiction in making the order or ruling complained of. Code, section 4154; *United States Standard Voting Machine Co. v. Hobson*, 132 Iowa, 38. In contempt proceedings, no appeal from the order of the court is allowed, but the revision provided for is by certiorari. Code, section 4468. As the proceeding is quasi criminal, a conviction should not be sustained unless the proof of guilt is clear and satisfactory. *Wells v. Given*, 126 Iowa, 340. But if there is clear and satisfactory evidence, the action of the trial court should not be set aside merely because some evidence has been erroneously received. *Drady v. District Court*, 126 Iowa, 345, 353; *Harlan v. Richmond*, 108 Iowa, 161.

Without regard to the evidence as to the reputation of the place, there was an ample showing before the trial judge of the unlawful keeping and sale of intoxicating liquors. One witness testified to having purchased such

liquors, and the showing furnished by the results of the search was practically conclusive. It is true that defendant testified that he had a case of beer for his own use, and that as agent for others he had procured other cases of beer with the direction of the purchasers that the beer so bought for them should be kept on ice for their use as they should require it. It could hardly be necessary, however, to keep forty or fifty bottles on ice for the casual or occasional calls of such pretended owners. A portion of the beer in the ice chest was concealed, and its presence there denied by the defendant until the officers making the search insisted on opening a drawer in the lower part. There was a barrel or more of empty whisky and beer bottles in the place. This evidence we think leaves no doubt that the defendant was keeping intoxicating liquors for unlawful sale, and was selling as he had opportunity, to persons who desired to purchase.

The punishment for contempt was properly imposed; and the writ is therefore *discharged*.

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EVE S. HEMPING AND SUSAN BURNER, Appellees, v. WILLIAM S. HEMPING AND OTHERS, Appellants.

**Homestead:** ELECTION OF WIDOW: AGREEMENT TO WILL: EVIDENCE.

The occupancy of property by a widow, including the homestead, under an agreement of the heirs of deceased to waive their legal right to distributive shares therein during her lifetime, will not establish an election on her part to take a homestead interest in the property, so as to entitle the heirs to enforce the agreement against her as a waiver of her right to a distributive share: nor will the arrangement be given effect as an agreement by the widow to make a will devising her interest in the property in equal shares to her children.

*Appeal from Story District Court.*—HON. W. D. EVANS,  
Judge.

THURSDAY, MARCH 11, 1909.

THE opinion states the material facts.—*Affirmed.*

*Dyer & Hull*, for appellants.

*Fitzpatrick & McCall*, for appellees.

WEAVER, J.—On March 6, 1897, John N. Hemping, Sr., a resident of Story County, Iowa, died intestate seised of one hundred and seventy acres of land in said county, forty acres of which constituted his homestead. He left surviving him his widow, Eve Hemping, one of the plaintiffs herein, and seven children, John N. Hemping, Jr., William S. Hemping, Aaron I. Hemping, Susan Burner, Mary Pyfer, Lizzie Bahr, and Kate Hemping, his only heirs at law. Later the daughter Kate Hemping died intestate, leaving her mother her only heir. The daughters Mary Pyfer and Lizzie Bahr are also now deceased, but the matter of the descent of their several estates is not material to the disposition of this appeal. Within a few days after the death of their father, all of the children, except Mrs. Burner, met at the family home and there made and executed to their mother a writing (subsequently signed by Mrs. Burner also) in the following words: "An agreement of the Heirs of John S. Hemping, Sr. Colo, Iowa, March 11, 1897. We, the undersigned, heirs of John N. Hemping, Sr., agree to waive all our right in his property, located in Story County, Iowa, in favor of his wife, Eve Hemping, who is to have absolute control of said property, during the rest of her natural life. John N. Hemping. W. S. Hemping. Susan Burner. Mary Pyfer. Lizzie Bahr. Kate Hemping. Aaron Hemping."

At the same time a separate writing was executed by the heirs agreeing to contribute to the reimbursement of such of them as had paid or should thereafter pay

off the expenses incurred in the last sickness and burial of their father; final adjustment of such account to be made when the estate should be finally settled. From this date until the beginning of the present controversy the widow continued in the occupancy, use and enjoyment of all of said lands, including the homestead, and the son Aaron Hemping lived with her. In the year 1905 dissension arose between some of the children, and thereafter there was a dispute or disagreement as to the nature and effect of the writing which they had given their mother. In 1906 William S. and John N. united in bringing an action in equity against their mother, alleging that she had elected to take homestead rights instead of a distributive share in the land, that the writing of March 11, 1897, had been given to her by the heirs in consideration of her waiver of a distributive share and her election to take a life estate therein, and a decree was asked adjudging and declaring her right in the land to be limited to a life estate only, and that the writing executed to her as aforesaid be reformed to express the agreement of the parties to that effect and for further relief. After the beginning of said action, the mother, with whom the daughter Susan Burner joined, instituted an action claiming to be the owner of a one-third interest in the land as widow of John N. Hemping, Sr., and an additional undivided one-seventh of the remaining two-thirds of said land as heir of her deceased daughter Kate, and asked partition of said property between herself and the surviving heirs at law. During the progress of the case she also entered a written relinquishment or waiver of any further right or claim under the writing of March 11, 1897. By order of the court the two cases were consolidated under the title of the latter and were tried together as one. The court found in favor of the widow that she had not elected to take homestead rights and had not accepted the writing



of March 11, 1897, in consideration of a release or waiver of her distributive share, and decreed a partition as prayed. From this decree the defendants (except Aaron L. Hempling) have appealed.

An impartial consideration of the record leaves no room for doubt as to the correctness of the conclusion reached by the trial court. The only parol evidence offered by the defendants having any direct bearing upon the meaning and intent of the parties in the agreement of March 11, 1897, is given by the sons William S. and John N., which is as follows: Referring to the meeting of the children at the mother's home and the talk which led up to the writing: "Mother said she wanted things left just as they were when father lived until she was dead. Then she wanted them divided even among the children. We talked that one-third of the property would not keep mother, and we all agreed, that was there, to let mother have the use of the property just as it was as long as she lived. We talked it over, and we all agreed that the estate should stand as long as mother lived, and she should have the income." The trouble with appellants' case is that every word of this testimony may be accepted as literally true, and it is in no manner inconsistent with the assertion of the mother that she did not agree or intend to relinquish her distributive share in the property. The writing as made expresses all which these witnesses themselves express, and there is no evidence whatever that there was any material mistake or omission in its terms. Nor is there anything shown in the conduct of the mother with reference to the property which is inconsistent with her present claim to a distributive share. True she continued to occupy and use the homestead as a place of residence, but she had the right to do so under the written waiver or consent which her children had given her, and, so long as her occupancy may fairly be referable to that

instrument, it can not operate as evidence of an election to take homestead rights. *Robson v. Lambertson*, 115 Iowa, 366.

Counsel advance the theory that the agreement between the parties; if not enforceable as a release of the widow's claim to a distributive share, should at least be given effect as an agreement by her to make a will devising her interest in equal shares to her children; but, as already remarked concerning her alleged waiver of her distributive share, such a holding would have no support in the record. No such thing appears to have been suggested by any one. Indeed, for the purposes of this case, it is not necessary for us to find there was any promise of pecuniary or property consideration on the mother's part for the execution of the writing in controversy. It is enough that the sons and daughters, recognizing the apparent needs of their widowed mother, provided for her declining years by voluntarily waiving for her benefit their legal right to the enjoyment and use of their several shares in the estate during the remainder of her life. The transaction has all the appearance of a gift—a free will offering—which they had a right to make, and which she had a right to accept without either of them being held to have relinquished his or her claims to the fee of the land. It is to the credit of the children that they should have thus regarded the interests and secured the comfort of their parent in her old age, and it is only to be regretted that the same tenderness should not have been sufficient to restrain them from forcing her into litigation with her own flesh and blood. The essential facts are practically undisputed. The equities are clearly with the appellees.

The decree of the District Court is *affirmed*.

EVANS, J., taking no part.

141	540
144	599
144	602

LYDIA C. CHAMBERLAIN, Appellant, v. WILLIAM L.  
L. BROWN AND OTHERS, Appellees.

**Landlord and Tenant:** USE OF PREMISES. In the absence of restrictions in the lease the tenant may use the premises as he chooses, not materially different however from the purpose for which they were specifically designed, so long as he does not commit waste or create a nuisance.

**Same:** RESTRICTION OF USE OF PREMISES: INJUNCTION. Where a lease expressly limits the use of premises to a specific purpose and prohibits its use otherwise, equity will enjoin a violation of the restriction by the tenant.

**Same:** IMPLIED RESTRICTIONS. There may be an implied limitation of the use of leased premises by a tenant, but it will only be found or enforced when a fair construction of the instrument demands it; and the mere statement that the premises may be used for a certain purpose will not give rise to an implied agreement that it would not be used for any other purpose, especially where there is a further provision that the tenant will not permit waste, or use the premises for any unlawful, improper or offensive purpose.

**Same:** CONSTRUCTION OF LEASE. The circumstances under which a lease was made, the conduct of the parties respecting the same, the condition of the premises and the practical interpretation of the instrument by the parties themselves, are matters to be considered as bearing upon the implications to be drawn therefrom.

**Same:** PAROL EVIDENCE. While parol evidence cannot be received to vary the terms of a written lease, still it may be admissible to show the manner in which it was understood by the parties.

**Same.** As bearing upon the intention of parties to a lease, the use made of the premises at and prior to the lease, their condition and suitability for a given purpose may be shown by parol: and, where the lease is silent as to the use of the premises the intention may be supplied by parol.

**Husband and wife:** JOINT TENANTS: LEASE BY HUSBAND: AGENCY. A husband who is a tenant in common with his wife can not bind her separate interest by a lease of the whole property without authority from her; but he may do so as her authorized agent, and his agency may be inferred from facts fairly indicating that

his act in so doing was with her knowledge and consent. Evidence held to show agency of the husband to lease his wife's interest in their joint property.

**Same:** RATIFICATION OF AGENT'S ACT: ESTOPPEL. A principal can not  
8 ratify and profit by a contract of lease made by an agent, and at the same time repudiate the obligations imposed by other provisions of the instrument.

**Same.** A contract will be construed against either party in the sense  
9 in which he had reason to believe the other party understood it; so that a lessor of property, under a lease made by an agent, will not be permitted to deny the right of the lessee to heat and light other property from the plant located on the leased premises, where it appeared that at a prior time, with knowledge of such use and without objection thereto he had made a written agreement with the lessee recognizing and modifying the original contract.

**Landlord and tenant:** WASTE. A tenant does not violate his cov-  
10 enant not to commit waste by using the heat and light on the leased property to heat and light adjacent property, where such use does not overtax or deteriorate the plants.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

THURSDAY, MARCH 11, 1909.

ACTION in equity for an injunction to restrain the defendant Brown from certain alleged misuse of leased premises and for damages. Petition dismissed, and plaintiff appeals. The material facts are stated in the petition.—*Affirmed.*

*Robert O. Brennan* and *Lewis Miles*, for appellant.

*Read & Read*, for appellees.

WEAVER, J.—In May, 1903, and for some time prior thereto, the plaintiff and D. S. Chamberlain, at

that time husband and wife, were the owners as tenants in common of a lot at the northeast corner of Locust and West Seventh Streets in the city of Des Moines; said lot extending eighty-eight feet on Locust and one hundred and thirty-three feet upon West Seventh. During the year mentioned the plaintiff was living temporarily at least in the city of New York, but the husband was personally engaged in business at Des Moines and appears to have had immediate oversight and management of said property. The defendant Brown being a man experienced in the hotel business, negotiations were opened between him and D. S. Chamberlain looking to the erection of a hotel building on the property above described to be leased and occupied by Brown. The discussion of the project and the settling of the details of the enterprise covered a period of several months. The plaintiff in New York was advised by her husband of the contemplated lease and the general nature of the proposed improvement, and, while but part of the correspondence between them is in evidence, she appears to have consented to the undertaking and to have left the negotiations entirely to him. In April, 1903, Chamberlain wrote his wife that the plans for building a six-story fireproof building, to be known as the Chamberlain Hotel, and to cost \$200,000, were complete, and that to carry out the scheme it would be necessary for him to raise \$150,000 by mortgage on the property, which instrument he inclosed with a request for her to execute and return the same, which she appears to have done. In May a preliminary written contract, by which the Chamberlains agreed to erect the building and Brown undertook to lease the same when completed on terms stated therein, was prepared in Des Moines and sent by Chamberlain to his wife, who signed and returned it. In December, following, the building being completed, a formal lease

was made and delivered to Brown. This writing was also executed by plaintiff in New York City. Shortly after the lease had been made, a divorce was decreed between plaintiff and husband, and in the settlement of alimony she received a conveyance of his interest in the hotel property. On January 4, 1906, Brown complained that the rent reserved in the lease had proved to be excessive, and plaintiff, after some investigation into the business and into the justice of the complaint, made a written offer to modify the contract, which offer was duly accepted. The modification relates solely to the amount of rent and terms of its payment. This action was begun August 19, 1907. The petition sets up the original contract, the lease, and the modification thereof to which we have referred; alleges that the property was designed to be used for hotel purposes only and was leased to the defendant for such purpose and for no other, but that defendant, in violation of the terms of the agreement, and without the knowledge and consent of the plaintiff, had made use of the heating and lighting plant, apparatus, and machinery (which had been put in at great expense for the use of the hotel only) to supply heat and light for other buildings on adjacent property and had in other ways made use of the property for purposes not contemplated by the terms of the lease. Upon the case thus stated plaintiff asked for the recovery of damages and for an injunction permanently restraining the lessee from using the heating and lighting plant of the Chamberlain Hotel to supply heat or light to any other property.

The defendant, admitting plaintiff's title to the property subject to his lease, denies that he has in any manner or form violated the terms of his tenancy. He admits that he has from the exhaust steam of the boiler on the leased premises furnished heat to certain rooms

in a building known as the Turner property facing on Seventh Street immediately north of his hotel, and further says that, in connection with the hotel leased from plaintiff, he conducts what is known as the Aberdeen Hotel or Chamberlain Annex, standing on the same block, but facing to the north, and that he has furnished and is furnishing to said annex heat, light, and hot water from the boilers and machinery in the Chamberlain. Defendant further alleges that all of his negotiations for the lease of the property owned by plaintiff were had with D. S. Chamberlain only, whom he then supposed to be the owner of the entire estate, subject only to the marital rights of the plaintiff, and that with the knowledge and consent of Chamberlain, and in anticipation of leasing the new house to be built, he acquired the Aberdeen with the purpose of operating it in connection with the Chamberlain Hotel, being advised so to do by D. S. Chamberlain, who pointed out to him that he could supply both houses with heat and light from a single plant. He further alleges that said Chamberlain acquiesced in said plans and purposes, and that in pursuance of such agreement and understanding, and at defendant's request, said Chamberlain, when putting in the heating and lighting plant, put in the connections necessary to enable the plaintiff to conduct heat, water, and electricity therefrom to said adjoining property; the extra cost and expense thus occasioned being paid by the defendant. He further denies that the use he has made of the machinery and appliances upon the leased property in furnishing heat, light, and water to the other buildings mentioned has in any manner occasioned injury to the plaintiff or to the leased property, and avers that the use to which he has put the property is such only as was contemplated by the parties in making the lease, and that plaintiff is therefore barred and estopped to maintain this action.

After hearing the evidence offered upon the issues joined, the trial court found: That the original contract and lease for the Chamberlain property was negotiated by the said D. S. Chamberlain for himself as a joint owner of the property and as the authorized agent and representative of the plaintiff; that the heating and lighting plants on the leased premises were made and constructed by said Chamberlain with a view to their use by defendant in supplying adjacent property if he should elect so to do, but not in excess of the rated capacity of said plant; and that it was upon that basis and in consideration of the building, machinery, and appliances as thus constructed that the lease was made and the rent charge fixed. It further found that from the time defendant entered into possession of the leased premises he made use of the heat, steam, and electrical appliances in supplying said additional property with the full knowledge of Chamberlain and with his consent, and that defendant was in the enjoyment of said use openly and notoriously before and at the time the lease was made, and has ever since been in such possession and use. It further found that, the plaintiff having accepted the benefits of the arrangement and agreement made between her husband and the defendant, she is estopped now to deny their binding obligation upon herself. The prayer for an injunction and other relief was therefore denied, and the appeal dismissed. From this decree the plaintiff has appealed. The proposition underlying the appellant's case is that the property was let for hotel purposes only, and that in supplying heat and light therefrom to the other property mentioned appellee has violated the terms of his lease. Whether this be so depends, of course, upon the construction to be placed upon the writing, and to that question, in the varying forms in which it is presented by counsel in argument, we now give attention.



I. The right of a lessor to restrict the use of leased property to a particular or specific purpose, if clearly expressed in the lease, is not disputed, and, if the case before us were one of this kind, its decision would involve no doubt or difficulty; but the lease we have to construe contains no express restriction or prohibition of any kind concerning the use of the premises, except such as may be found in the agreement of the lessee that he will not underlet the premises or make any changes therein and will not suffer waste or any unlawful, improper, or offensive use thereof. Indeed, there is no express statement in the lease itself to indicate that the building is constructed or intended for use as a hotel. It is true that the preliminary contract made in May, 1903, provides that Chamberlain and wife will erect a hotel on the site mentioned and supply it with certain machinery, appliances, and conveniences, and that when finished the property will be let to the appellee for a stated period on terms as contained in the lease subsequently executed. This prior contract may properly be considered among the circumstances in the light of which the lease is to be construed; but it constitutes no part of the lease itself, and, if the latter instrument when thus construed does not restrict the use of the machinery and appliances solely to the convenience and requirements of the Chamberlain Hotel, then the trial court was not in error in denying the relief demanded in the petition. It is an elementary principle of the law of landlord and tenant that in the absence of restriction, express or clearly implied, in the contract of lease, the tenant is during his term entitled to all of the rights of use which the owner of the property ordinarily exercises and enjoys, and may put the premises to whatever lawful use he may choose not materially differing from that for which they have been

1. LANDLORD AND  
TENANT: USE  
of premises.

specially designed or constructed, so long as he commits no waste and creates no nuisance. 24 Cyc. 1061; 18 Am. & Eng. Encyc. Law (2d Ed.) 634.

As already suggested, if the lease expressly limits the use of the property to a specific purpose and prohibits its use for any other, a court of equity will upon a proper showing enjoin the violation of the restriction by the tenant. *Stewart v. Winters*, 4 Sandf. Ch. (N. Y.) 587. With very few exceptions all of the cases applying this rule involve the consideration of leases which expressly and clearly provide that the property shall be used for specific purpose, and for no other; but counsel say, and cite authorities to the effect, that, in the absence of express provision therefor, the restriction to a particular use will sometimes be implied, and the correctness of this proposition may be admitted.

It is no less true in our judgment that an implication prohibiting a reasonable and orderly use of property by a tenant will not be found or enforced unless a fair construction of the language implied clearly demands it. As said in *Brugman v. Noyes*, 6 Wis. 3: "Equity will not raise an implied covenant in restraint of the beneficial use of the property." We are not prepared to accept the contention of counsel that the mere statement that leased property is to be used or may be used for a given purpose is, without more, sufficient in all cases to raise an implied covenant or agreement that it will not be used for any other purpose. The case above cited from the Wisconsin court is here directly in point. The lease there being considered was for certain property to be used as "cabinet warerooms," and the landlord sought to enjoin their use for any other purpose. In denying the right to this relief

2. SAME:  
restriction  
of use of  
premises:  
injunction.

3. SAME:  
implied  
restrictions.

the court had occasion to consider the same argument which is urged upon our attention in the instant case, and said:

If the complainant had leased the premises expressly and exclusively to be used for a particular purpose or in a particular manner, and there was a continuing breach or disregard of the stipulation, a court of equity would perhaps interfere and enforce the restriction by compelling the lessees to use them for their business. The insuperable difficulty in this case is that there is no express covenant not to use the buildings except for cabinet warerooms. The clause in the lease is that the buildings were to be used as cabinet warerooms without the words of restriction. It appears that there is another clause in the lease that no cabinetware should be manufactured in the buildings, and probably this express prohibition would have been enforced had the lessee entered upon the business of manufacturing cabinetware. The counsel for the complainant contends that the clause in the lease that the premises were to be used as cabinet warerooms amounts to a direct covenant to use them as such, and for no other purpose whatever. We are unable to concur in this construction of the lease. Of course the intention of the parties, as that intention is gathered from the whole lease, must control in the case, and, looking at the language of this clause, as well as of other clauses, we do not feel authorized in saying that the sense and meaning of the words employed show that it was the intention of the parties to restrict the use of the buildings to cabinet warerooms and prohibit the use of them for any other purpose. We think such a construction is forced and ought not to be adopted. As already observed, there is an express covenant against manufacturing cabinetware in the buildings, and it seems but fair to presume that, if the parties intended restraining the use thereof to cabinet warerooms, they would have distinctly and expressly stipulated to that effect. It is obviously inconsistent with the principles upon which courts of equity act to raise by implication a covenant in restraint of a beneficial use of the property.

To the same effect, see *Shumway v. Collins*, 6 Gray

(Mass.) 227; *Kerley v. Mayer*, 10 Misc. Rep. 718 (31 N. Y. Supp. 818); *Nave v. Berry*, 22 Ala. 382; *Foozer v. Bank*, 78 S. C. 5 (58 S. E. 934).

The case of *Kraft v. Welch*, 112 Iowa, 695, relied upon by appellant, is not inconsistent with these holdings, for in that case the property was not only "let for creamery purposes," but expressly enumerated what additional buildings might be placed thereon by the tenant, and it was a violation of this provision by him in erecting a building not so authorized which we held would be enjoined by the court.

Again, as we have seen, the lease before us contains an express covenant that appellee will not suffer any waste or any unlawful, improper, or offensive use of the premises, and, as suggested in the *Brugman* case, *supra*, it is not an unreasonable argument that the express mention of these certain restrictions carries with it at least a slight implication that none other was intended. There is another familiar rule applicable to cases of this kind that, if the meaning and effect of the lease be fairly capable of two constructions, that will be adopted which is most favorable to the lessee. *Schmol v. Fiddick*, 34 Ill. App. 190; *Klingler v. Ritter*, 54 Ill., 140; 18 Am. & Eng. Encyc. Law (2d Ed.) 617.

It is also a familiar law applicable to all classes of contracts that the circumstances under which the writing was made and conduct of the parties with reference thereto, the condition of the property which is the subject-matter of the agreement, and the practical construction which the parties themselves have placed upon it, are all matters which have a legitimate bearing upon the construction of the terms implied therein. For cases applying this rule to agreements between landlord and tenant, see *Milan v. Kephart*, 18 Grat. (Va.) 1; *Bartels v. Brain*, 13 Utah, 162 (44 Pac. 715); *Bell's Adm'x v. Golding*, 27 Ind. 173; *Thomas v. Wiggers*,

4. SAME:  
construction  
of lease.

41 Ill. 470; *Bellinger v. Kitts*, 6 Barb. (N. Y.) 273; *Sire v. Rumbold* (City Ct. N. Y.) 11 N. Y. Supp. 734; *Herscher v. Brazier*, 38 Ill. App. 654; *Hard v. Brown*, 18 Vt. 87; *Pine Beach v. Columbia*, 106 Va. 810 (56 S. E. 822).

Applying these tests to the lease in controversy, we discover no reason for giving to it any narrower or more restricted effect than would ordinarily be inferred from a lease in which no express restrictive terms are employed. On the contrary, the circumstances under which the lease was made and the conduct of the parties with reference thereto go far to bear out the appellee's contention.

Of course oral testimony can not be allowed to vary the terms of a written lease, but it is sometimes admissible in support of the contract to show in what manner it was understood by the parties who made it. It

5. SAME: parol evidence. is shown in evidence without dispute that, even before the preliminary contract was made, the matter of the opportunity the lessee would have to furnish heat and light to the other buildings was talked of and understood between appellee and D. S. Chamberlain, and that the latter in putting in the machinery and appliances provided the proper connections to facilitate such use; appellee paying the extra expense thus incurred. It further appears that said connections were made at or about the same time said machinery and appliances were installed, and that for some time before the lease was made appellee had been in possession using the steam and heat for both the Chamberlain Hotel and the annex, and that such use was open and notorious and well known to Chamberlain. Under such circumstances we think it very clear that the property upon which the lease was intended to operate was the property as it then existed fitted and intended, so far as the matter of heat and lights was concerned, to supply the needs of said additional property. In constructing and adapting the machinery and appliances to

this use, the parties clearly contemplated the very things of which appellant now complains, and, unless she occupies a stronger position in this respect than D. S. Chamberlain would were he still the owner and were asking an injunction, she can not now be heard to say that such use is wrongful or unauthorized.

It has been very properly held that the use to which leased premises are being put at the date of the transaction, as well as their prior use, may be inquired into as bearing upon the intention of the parties to the lease.

6. SAME.

*Gutheridge v. Mungard*, 1 C. & P. 129. The condition of the premises may be inquired into. *Thomas v. Wiggers*, 41 Ill. 470. And where, as in this case, the lease does not reveal the intended use of the premises, it may be supplied by parol. *Landt v. Schneider*, 31 Mont. 15 (77 Pac. 307). So, also, may the suitability of the leased premises for a given use. *Bartels v. Brain*, *supra*. In *Wood v. Edison Co.*, 184 Mass. 523 (69 N. E. 364), involving the construction of a lease, the court says: "If there was uncertainty in the meaning of the several writings taken together and applied to the situation and the circumstances of the parties, the construction put upon them by the parties themselves may be considered, and in a case like this it is important evidence." In an action on a hotel lease, evidence of the conduct of the parties in reference to the contract has been admitted showing their construction of its terms. *Bell's Adm'x v. Golding*, 27 Ind. 173.

Taking the record as a whole, there is no escape from the conclusion that the appellee's use of the property violates none of the express or fairly implied terms of the lease and is, moreover, in strict accord with the construction which was placed upon the agreement from the beginning by both Chamberlain and appellee.

To what extent appellant is bound by the acts of D.

S. Chamberlain we will consider in the next paragraph of this opinion.

II. The views already expressed would probably make necessary the affirmance of the decree below, even if any room existed for difference of opinion upon the question of the agency of D. S. Chamberlain for appellant in negotiating the contracts made with appellee; but counsel have addressed themselves to that phase of the case, and

7. HUSBAND AND  
WIFE: joint  
tenants: lease  
by husband:  
agency.

we shall briefly indicate our conclusions thereon. As contended by counsel, the mere fact that D. S. Chamberlain was the husband of the appellant and tenant in common with her in the title gave him no authority to sell or lease her property, or to bind her in any manner as to her separate interest in their joint property; but it is equally true that the husband may act as the wife's agent, and that such agency may be inferred from facts and circumstances fairly indicating that his acts with reference to the common property have been done with her knowledge and acquiescence. This, we think, is the necessary conclusion to be drawn from the undisputed facts in evidence. Appellant was in a distant city, and all of the negotiations with appellee were carried on by her husband, and of the fact that such negotiations were in progress she was advised. She was aware of at least the general nature of his purpose to improve the lot by building a hotel thereon and leasing it to appellee. She ratified the preliminary contract, the negotiation of the mortgage, and the giving of the lease. After the plans of the hotel had been first arranged, Chamberlain changed them, enlarging the building and increasing its cost beyond what was originally contemplated, and to this she appears to have acceded. The cost of the building was largely in excess of the sum raised on the mortgage, and this, it would seem, was furnished by him. In short, the management and control of the enterprise were from the beginning conducted by him in practically the same manner as if he

were the sole owner, and of this conduct on his part appellant could not have been ignorant, for, although not in Des Moines, she knew the enterprise was being carried on and the building being brought to completion, and that she was herself exercising no active control over it. If such facts do not justify the finding of an agency on his part and authority from his wife to exercise reasonable discretion as he might in good faith believe their common interest demanded with reference to the details of the undertaking in which they were engaged, it would be difficult indeed to imagine a combination of circumstances from which the relation of principal and agent may be inferred. See 1 Clark & Skyle's Agency, section 79b, and cases there cited, in notes 50 and 57.

Furthermore, we think it is a sufficient answer to the plaintiff's position on this point to say that she is now in court seeking to enforce a contract made by and through an authorized or unauthorized agency of D. S. Chamberlain concerning their common property, and for several years she has been receiving the benefits of that contract, which she still retains, and she can not be heard to say that she will ratify and profit by one part of the transaction, while repudiating its obligation upon her as to another part. This doctrine is too well established in this and other courts to require argument. *Eadie v. Ashbaugh*, 44 Iowa, 519; *Lull v. Bank*, 110 Iowa, 537; *Higbee v. Greenbaum*, 112 Iowa, 75; *Victor Co. v. Rheinschild*, 25 Kan. 534; *Forster v. Wilshusen*, 14 Misc. Rep., 520 (35 N. Y. Supp. 1083); *Bacon v. Johnson*, 56 Mich. 182 (22 N. W. 276); *Swatara R. R. Co. v. Brune*, 6 Gill (Md.) 41; *Valentine v. Healy*, 158 N. Y. 369 (52 N. E. 1097, 43 L. R. A. 667). The record affords abundant support of the court's finding that Chamberlain was to all intents and purposes appellant's agent in their dealings with the appellee.

8. Same:  
ratification  
of agent's  
act: estoppel.

III. The testimony does not sustain appellant's as-



sertion that she had no notice or knowledge of appellee's claim of right to supply heat and light to the annex and to the Turner building until shortly before the beginning of this suit. To say nothing in

9. SAME.

this connection of the notice which the law imputes to her because of the knowledge of her agent, Chamberlain, it is further shown that, when appellee sought from her a modification of the lease on the ground that the rent was excessive and more than the business would justify him in paying, appellant employed a representative, one Brackett, to examine appellee's books and investigate the condition of the business to satisfy herself of the justice of the request and the advisability of yielding to the same. The books disclosed the fact that heat and light were being supplied to the annex and to the Turner building, and showed the income derived from that source. Brackett noted this item and asked appellee for an explanation thereof, which was given him. Appellant admits that Brackett told her that exhaust steam was being used to supply the annex. With this knowledge, both actual and constructive, and upon the showing thus made of the sources of appellee's income from the property, she entered into a written agreement which recognizes and affirms the lease already made, subject only to a modification respecting the rent to be paid, and this she did without offering objection or protest to the construction which she knew that appellee was placing upon the contract, or to the use he was making of the leased premises. To permit her now to repudiate such understanding and to so restrict the use of the premises as to cut off valuable rights and privileges which she then knew appellee was claiming to exercise under the lease would be in a high degree inequitable and violative of the statute, which provides that a contract shall be construed against either party in the sense in which he had reason to believe the other party understood it. Code, section 4617.

IV. The conclusion we have announced does not nega-

tive the right of the appellant to maintain an action to prevent waste of the leased premises by excessive or unreasonable use of its machinery and appliances in supplying heat or light to other property.

10. LANDLORD AND  
TENANT:  
waste.

It is the claim of counsel in argument that this condition is in fact shown to exist, but we think the evidence as a whole does not sustain the contention. We shall not prolong the opinion to recite the testimony of the witnesses on this point. It is sufficient to say that the machinery is not shown to have been overtaxed, or that the plant in general has suffered deterioration by excessive demands upon its capacity.

Other questions argued are governed by the findings hereinbefore stated, and we need not give them our consideration.

The decree of the district court appears to be right, and it is *affirmed*.

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ANNA BURKE, Appellee, v. P. F. MALLY, Appellant.

**Traction engines: DUTY TO ASSIST TRAVELERS: STATUTE: DAMAGES.**

- 1 The statute relating to the operation of a traction engine along a highway is penal in character and will be strictly construed; so that one in charge of an engine which is not being operated along a public street or highway is not required to keep a man in advance to assist travelers with horses or other stock, although the way used by the engine may be used permissively by the public.

**Damages: ACTION BY MARRIED WOMAN: INSTRUCTION.** Where a married woman made no claim in her action for a personal injury that she was engaged in an independent occupation, an instruction permitting recovery for damages caused by her inability to follow any other vocation than that of keeping house for her husband was erroneous.

*Appeal from Polk District Court.*—HON. W. H. MOHENRY,  
Judge.

THURSDAY, MARCH 11, 1909.

ACTION at law to recover damages for injuries received by plaintiff while trying to hold and tie a horse that had been frightened by a steam traction engine, which it is claimed defendant was negligently moving on a public street. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Reversed*.

*Robert O. Brennan and Dunshee & Haines*, for appellant.

No appearance for appellee.

DEEMER, J.—There is a section of our Code reading, in part, as follows: "Sec. 1571. Steam engines on roads. Whenever any engine driven in whole or in part by steam power is being propelled upon a public road, or is upon the same, the whistle thereof shall not be blown, and those having it in charge shall stop it one hundred yards distant from any person or persons with horses or other stock in or upon the same, and at a greater distance away if they exhibit fear on account thereof, until they shall have passed it, and a competent person shall be kept one hundred yards in advance of such engine to assist in any emergency arising from frightened animals, and to prevent accidents." Plaintiff's action is bottomed upon this statute, as well as upon a breach of a common-law duty owing her. The charge in the petition is: That, while she was driving a single horse to an open single-seated buggy, upon a street running north and south, in the city of Des Moines, and at a point immediately north of where said street crossed another running east and west, she discovered a steam traction engine propelling a steam thresher upon said east and west street; "that immediately, upon said horse which this plaintiff was then driving observing said engine, he became greatly fright-

ened thereat and began to back, kick, rear and plunge forward; that this plaintiff thereupon requested this defendant, who was the owner and in charge of said thresher and engine, to stop the same, and not to approach nearer to this plaintiff and towards the horse she was then driving; that said defendant and the engine in his charge at that time was within less than one hundred yards distant and in plain view; that said defendant, disregarding said fact and the frightened horse she was then driving, ordered said plaintiff to turn around and go the other way; that said defendant, regardless of plaintiff's rights, and indifferent to her safety, continued to move and propel said engine at and towards the plaintiff and the horse she was driving; that, said horse becoming unmanageable from fright, the plaintiff was forced to alight from her buggy to save being overturned, and in endeavoring to tie and fasten said horse she was greatly injured by reason of the rearing and plunging of said frightened beast; that she had the thumb on her right hand broken and dislocated and her right arm badly wrenched and dislocated." She further charged: "That the injuries complained of were caused solely by the defendant's negligence, and this plaintiff charges that the defendant was negligent in not stopping said engine at the request of plaintiff and within a proper distance from her, and in not assisting said plaintiff when he saw her horse had become frightened and unmanageable, and in not keeping a competent person at least one hundred yards in advance of said engine, to assist in any emergency which might arise from the frightening of her horse."

The answer was practically a general denial and a plea that plaintiff was guilty of contributory negligence. Defendant concedes in argument that it was his duty to stop the engine, upon plaintiff's request, within a proper distance, so as to prevent injury to her, and that, if he saw plaintiff's horse had become unmanageable, it was his

duty to have rendered her proper assistance; but he claims that there was no evidence to show that he failed to perform either duty, and that the trial court was in error in submitting these issues to the jury. We have examined the record with care and fail to find sufficient testimony to justify the court in submitting the question of defendant's negligence in failing to stop the engine upon her request, and within a proper distance. Nevertheless the court submitted this issue in its third instruction, and thus erred to the prejudice of defendant.

II. There may have been sufficient testimony to take the case to the jury upon the question of defendant's failure to render prompt assistance, although it must be confessed that as presented in the abstract it is quite meager.

III. The trial court instructed that the testimony introduced by plaintiff was sufficient to bring the case within the statute quoted in the first paragraph of this

1. TRACTION EN-  
GINES: duty  
to assist trav-  
elers: statute:  
damages.

opinion, and that, if defendant failed to keep a man one hundred yards in advance of the engine to assist in emergencies and to prevent accidents, he would be liable for all injuries received by plaintiff on account of such neglect. It is conceded that defendant had no one in advance of the engine, but it is argued that the facts disclosed do not bring the case within the statute. In the absence of statute, there was no such duty resting upon the owner of a traction engine. *Macomber v. Nichols*, 34 Mich. 212 (22 Am. Rep. 522). The statute then gives the remedy, and, as it is penal in character, it must, under well-understood canons, have a strict construction. The testimony in the case shows that, while plaintiff was passing over and along a public street in the city of Des Moines, the defendant was taking what was called a "short cut" across the commons, and was at a place between the streets with his traction engine when plaintiff's horse was frightened.

He was not upon a road or street, but on the commons between streets, and was using what was called a "short cut," which it seems was used permissively by persons who cared to use it. There is no showing that this was a public road, although it was used by the public as indicated between public roads. As the statute must have a strict construction, we do not think it can be held to apply to the case as made by the testimony. The engine was not upon a public road, and defendant was not required to keep a man one hundred yards in advance thereof. This view has support in *State v. Snyder*, 25 Iowa, 208. The testimony unqualifiedly shows that plaintiff was driving south on a street forming the western boundary of a block, and had passed halfway down the block when the engine, which came across the vacant block from the southeast toward the northwest corner, frightened the horse. Plaintiff had no occasion to pass the engine, nor was defendant expecting to, nor could he have passed the plaintiff. The case is no different from one where an engine is moving across an open field adjoining a highway, or where it is not moving, but is in operation. We are now discussing the defendant's statutory liability, and are of opinion that the case as presented by the testimony does not fall within the statute.

No claim was made in the petition that plaintiff, who is a married woman, was engaged in any independent vocation. Indeed, she charges that she was unable to follow her usual vocation as a housewife, and nothing else. The trial court, nevertheless, instructed that she was entitled to recover for loss or damage suffered by her due to her inability to pursue any other avocation than that of keeping house for her husband. In this there was manifest error. No claim was made in the petition for the loss of such services.

For the errors pointed out, the judgment must be, and it is, *reversed*.

2. DAMAGES: action by married woman: instruction.

HOME SAVINGS BANK, Appellant, v. F. T. MORRIS, ANDREW GROVES, J. H. MATHIS, P. J. MALLEY and L. H. DE FORD, constituting the Board of Supervisors of Polk County, Iowa.

**Taxation: REFUND OF TAXES: INTEREST: MANDAMUS.** The statute  
1 directing the supervisors to order the refund of taxes erroneously  
or illegally exacted or paid, does not provide that the county shall  
pay interest on the money refunded, and *mandamus* will not lie  
to compel its payment.

**Same: STATUTORY ACTION: RECOVERY.** A tax payer who brings his  
2 action in reliance upon the statute to recover interest on taxes  
wrongfully exacted can not recover independently of the statute.

**Refunding taxes: STATUTE: CONSTITUTIONALITY.** A taxpayer who  
3 has invoked the provisions of the statute for the purpose of  
compelling a refund of taxes wrongfully exacted is precluded  
from contending that the statute is unconstitutional, because fail-  
ing to provide for interest on the money refunded.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

THURSDAY, MARCH 11, 1909.

ACTION for a writ of mandamus to compel the board of supervisors to order the issuance of a refund warrant for certain interest alleged to be due the plaintiff on money illegally received from it. A demurrer to the petition was sustained, and the plaintiff appeals.—*Affirmed.*

*Dale & Harvison*, for appellant.

*Halloran & Starkey*, for appellees.

SHEERWIN, J.—On the 1st day of January, 1902, the plaintiff had a certain amount of its capital invested in

government bonds; but in assessing the capital of the bank for taxation for said year the amount so invested was not deducted. The bank appeared before the board of review and asked that the capital so invested be exempted from taxation. This was denied, and thereafter the action of the board of review was affirmed by the district court, and still later, in December, 1904, the decision of the district court was affirmed by this court. The case was then taken to the Supreme Court of the United States, where a decision reversing the finding of this court was handed down in April, 1907. See *Home Sav. Bank v. Des Moines*, 205 U. S. 503 (27 Sup. Ct. 571, 51 L. Ed. 901). While the litigation was pending in the district court, the plaintiff paid the tax levied against it, the first one-half thereof on the 31st of March, 1903, and the second one-half September 30, 1903. After the case had been finally decided, the plaintiff filed with the board of supervisors a claim for the tax so paid with interest thereon from the dates of payment. The amount of tax paid was refunded, but the board refused to pay interest thereon, and thereafter this action was commenced to compel the board of supervisors to order the issuance of a refund warrant for said taxes with interest thereon from the date of payment.

Section 1417 of the Code provides that: "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon." The plaintiff's action is founded

1. TAXATION:  
refund of  
taxes: interest:  
mandamus.

on this statute, and whatever rights it may have must be derived therefrom, and, unless it by clear implication requires the board of supervisors to pay interest on the tax illegally exacted or paid, the plaintiff's action can not be maintained. The statute provides (Code, section 4341): "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corpora-



tion or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion." To maintain this action of mandamus therefore the plaintiff must show that section 1417 provides for the payment of interest by the county on all taxes which the section orders refunded. If it does not so provide, the plaintiff has no case, because this action will not lie to control the discretion of the board. It seems to us that the statute itself fully answers the appellant's contention. It says in so many words just what shall be done. It says that the treasurer shall be directed to refund the tax illegally paid, together with all interest and costs actually paid on said taxes. The evident meaning of the word "refund," as used in this statute, is to pay back, to restore, what has been wrongfully taken, and, the Legislature having in express terms directed restoration only, the court should not amend the statute by a forced construction thereof. If the Legislature had intended to provide for the payment of interest on taxes illegally collected, when refund was made, it would have said so in unequivocal language. In *Callanan v. Madison County*, 45 Iowa, 561, *Scott v. Chickasaw County*, 46 Iowa, 253, and same case, in 53 Iowa, 47, and in *Brownlee v. Marion County*, 53 Iowa, 487, relied upon by the appellant, the question now before us was not involved, although in the *Scott* case, in 45 Iowa, 253, it was said that interest might be recovered. There was no discussion of the question, however, and an examination of the case shows that no such issue was made.

While the appellant in one branch of its argument takes the position that it has an absolute right to interest under section 1417, and that the question whether its payment of taxes was voluntary or involuntary is of no materiality, in

2. SAME: statutory action: recovery.

another branch of its argument it insists that the payment was involuntary, and because thereof that it has the right to recover independently of the statute. The payment made by the plaintiff seems to have been made to avoid the penalty exacted by the law when taxes are not paid by a certain time. It certainly was under no legal obligation to pay while the matter of the assessment was in litigation, and any effort to force a payment during that time would have met defeat. So it seems to us that the payment was voluntary; but the question need not be definitely decided, because the plaintiff brought this action relying upon the statute, and its case must therefore be brought within its provisions.

The appellant also contends that the statute is unconstitutional if it does not provide for the payment of interest. It is a general rule that "only those whose rights would be prejudiced by the enforcement of an unconstitutional act will be heard to question its validity." 6 Am. & Eng. Enc. of Law, 1090; 8 Cyc. 787-789, and cases cited. It is also the rule that, where parties to civil proceedings acknowledge the validity of a statute by their acts or pleadings, they are precluded from attacking such statute as unconstitutional. 8 Cyc. 795, and cases cited. And one who has tried to enforce a statute to the detriment of others can not afterwards question its constitutionality. 6 Am. & Eng. Enc. of Law, 1090; Cooley's Constitutional Limitations (2d Ed.) 214. The plaintiff claims under the statute in question, and by virtue of its provisions it is entitled to and will get a refund of the money actually paid to the county. So far its constitutionality is not questioned. The substance of the appellant's contention is therefore that the statute is invalid because it does not give it more or greater rights. We think there is no merit in the proposition. The demurrer was rightly sustained, and the judgment must be, and it is, *affirmed*.

3. REFUNDING  
TAXES:  
statute: con-  
stitutionality.

IN RE ESTATE OF ANDREW DUNCANSON, Deceased, GRACE  
DUNCANSON ET AL., Appellants, v. W. R. DUNCANSON,  
Executor.

**Wills: CONSTRUCTION: INTEREST AS PART OF LEGACY.** The intention  
1 of a testator as gathered from the provisions of his will when  
considered together will govern in its construction; so that while  
as a general rule interest on legacies does not commence to run  
until after or at the death of testator, still where the testator has  
clearly provided that a specific legacy should be increased by interest  
on the sum from a certain date prior to his death, the general  
rule does not apply.

**Same.** In the instant case the will provided that certain legacies  
2 should be increased by interest from a certain date prior to testator's death, and by other provisions that the legacies should be paid from the proceeds of certain lands to be sold by a devisee to whom they were given subject to the legacies, or who should pay interest from such date, but none of the legacies were to be paid until the youngest legatee had reached his majority. *Held*, that while the provisions relating to the sale of the land were uncertain as to payment of interest, still it would not overcome the direct provision for payment thereof from the specified date.

**Estates of decedents: EXECUTORS REPORT: AMENDMENT: CONSIDER-**  
3 **ATION.** An amendment to an executor's report filed on the day the case is submitted, which is denied and there is no evidence to support it, will not be considered.

**Inventory of estates: DUTY TO FILE.** An executor is required by  
4 statute to file an inventory of the estate before he is discharged, and it is the duty of the court to order him to do so, irrespective of who makes the complaint.

*Appeal from Woodbury District Court.*—HON. F. R.  
GAYNOR, Judge.

THURSDAY, MARCH 11, 1909.

THE opinion states the case.—*Reversed.*

*R. M. Corbit*, for appellants.

*J. M. Wormley and Sullivan & Griffin*, for appellee.

SHERWIN, J.—Andrew Duncanson died in 1900, leaving a will dated January 22, 1893, and a codicil thereto dated one day later, which will and codicil were duly probated. The will devised to W. R. Duncanson, his son, the appellee herein, two hundred and forty acres of land, describing it, and, in addition to such specific devise, it gave him the rest of the testator's property, both real and personal, charged, however, with the payment of certain legacies to the testator's grandchildren named therein. The third clause of the will bequeathed to Gracie Duncanson and Charles R. Duncanson \$1,000, "with interest after March 1, 1895, rate 5 percent." In the fourth clause of the will \$1,000 was bequeathed to Samuel A. Duncanson and Marion Duncanson, and it was therein stated that "the two above" bequests were "to be taken from the proceeds of the land when sold situated as described below now owned by me." The clause then designated land other than that specifically devised to the appellee. In the fifth clause of the will it was said: "The said W. R. Duncanson is to dispose of the above-described land or pay interest to said above children on or after March 1, 1895, at the rate of 5 percent interest." In the sixth and seventh clauses of the will it was provided that the legacies to the children were to be paid by W. R. Duncanson when the youngest one became of age, and that said Duncanson should give a bond for such payments. In the eighth clause of the will it was said: "The interest on the above two thousand dollars to be kept at interest at the rate of five percent after March 1, 1895, and the whole to be then paid over to the four children after the youngest is of age." In the codicil the testator referred to the provisions of his will made the day before, and stated that he had

deeded to W. R. Duncanson the Rutland township farm devised therein to him. W. R. Duncanson was named in the will as sole executor thereof, and qualified, and has acted as such. The youngest legatee became of age early in 1908, and in March of said year the appellee filed a final report in said estate, in which he charged himself with interest on the legacies named from February 28, 1900, the date of the testator's death. Objections to such report were filed by the legatees named herein, on the ground that they were entitled to interest on their legacies from March 1, 1895, and objection was made to the final discharge of the executor because he had filed no inventory of the estate, as required by law. The objections were overruled, and the report of the executor was approved.

The question of controlling importance is whether the appellants are entitled to interest from March 1, 1895, as a part of the bequests to them, or whether interest shall be allowed from the date of the testator's death only. There is no dispute as to the appellee's liability for the payment of the legacy of \$500 to each of the four grandchildren, the appellants herein, nor as to his liability for the payment of interest thereon from the date of the testator's death. It is of course fundamental that the intention of the testator is to govern, and that such intention is to be ascertained from the various provisions of the will considered together. We know of no reason why the testator could not lawfully provide that the \$500 to be paid to each of his grandchildren upon the majority of the youngest should be increased by adding thereto interest from March 1, 1895. Such a bequest would be certain and definite, for nothing would be necessary to make it so but a mathematical calculation. The general rule that interest on legacies does not commence until after, or at the time of, the testator's death has no application here, because the testator may provide otherwise, and make the

1. WILLS:  
construction:  
interest as  
part of legacy.

interest so provided for a part of the legacy. The only question, therefore, is what was the intent of the testator.

In the third and eighth clauses of the will it is expressly provided that the legacies shall be increased by interest computed from March 1, 1895, and were there

2. SAME. nothing further to consider, no doubt as to the intent could be raised. The provisions

in the fourth and fifth clauses that the legacies "shall be taken from the proceeds of the land when sold," and that W. R. Duncanson is to dispose of said land "or pay interest on or after March 1, 1895," do not in our judgment sustain the appellee's contention that interest prior to the testator's death should not be allowed as a part of the legacies, unless it is shown that W. R. Duncanson kept said land. While these provisions, standing alone, appear to be somewhat inconsistent with the direct provisions for interest from March 1, 1895, when considered in connection with other provisions of the will, they appear less so. None of the legacies in question were to be paid until the youngest grandchild reached its majority, and consequently there would be no necessity for the sale of the land until that time. If he sold it before then, and kept the money required to pay the legacies, he would derive a benefit from the use of the money as great probably as he would derive from the use of the land itself. This the testator must have understood, and we do not think he contemplated or required a sale of the land before the legacies became due. In the fourth clause he expressly charged the land in question with the payment of the legacies, and we think he intended in the next clause to direct its sale for that purpose, and that the legacies be paid as elsewhere therein provided. The meaning of the fifth clause is at least uncertain, and it should not be permitted to overcome the direct and certain language and meaning of the other provisions of the will. *Covert v. Sebern*, 73 Iowa, 564; *Armstrong v. Crapo*, 72 Iowa, 604.

The appellee also says that the land under consideration was sold in his lifetime by the testator, and that interest should not be allowed from March 1, 1895, because thereof. The appellee alleged such sale in an amended report filed on the day that the case was submitted. The allegation was fully denied by the appellants, however; and, there being no evidence in support thereof, it can not be considered. *Downing v. Nicholson*, 115 Iowa, 493.

The court should have required an inventory of the estate. Code, section 3310, expressly requires it, and we have held that it is the duty of the court to order it, no matter from what source the complaint of a failure to do so comes. *Poole v. Burnham*, 99 Iowa, 493. The report filed by the executor shows that he received personal property from the estate, and such showing is sufficient to invoke the operation of the statute.

For the reasons pointed out the judgment must be, and it is, reversed.

The appellant's motion to strike the appellee's amendment to the appellant's abstract is sustained.—*Reversed*.

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MARTHA CAMPBELL, Appellee, v. C. R. MOOREHOUSE, GAR BOLSTER, WM. WEHRHEIM, BERTHA WADDELL and HIRAM WADDELL, Appellants.

**Exchange of property:** RESCISSION: EQUITABLE RELIEF: EVIDENCE. A party who is entitled to rescind an executed contract for the exchange of lands may have a judgment for a reconveyance of the land, or for its value, conditioned on a reconveyance of the land received by him free from incumbrance; but courts of equity are not bound by any fixed rule and may adopt such relief as is suited to the particular circumstances: as in the instant case plaintiff is awarded judgment for the value of the land conveyed by her less the amount of incumbrance placed upon the land received,

and defendants are awarded a reconveyance of their land subject to the incumbrance.

*Appeal from Wright District Court.*—HON. R. M. WRIGHT, Judge.

THURSDAY, MARCH 11, 1909.

SUIT in equity to rescind a contract for the sale of real estate; to recover the property conveyed by plaintiff to defendant Wehrheim; and for other equitable relief. Defendant Moorehouse was not served with notice; defendant Bolster filed a general denial; and defendant Wehrheim filed a separate answer, as did defendants Waddell. Upon the issues joined the case was tried to the court resulting in a judgment against defendants Wehrheim and Bolster for the sum of \$1,325 and costs. The defendant Bertha Waddell was found to be a good-faith purchaser of the property conveyed to Wehrheim, and no relief was granted against her. Defendants Wehrheim and Bolster appeal.—*Modified and remanded.*

*Sylvester Flynn*, for appellant Wehrheim.

*J. W. Henneberry*, for appellant Bolster.

*Eugene Schaffter*, for appellee Waddell.

*McGrath & Archerd*, for plaintiff, appellee.

DEEMER, J.—About August 15th of the year 1906, plaintiff entered into a contract with defendant Wehrheim for the exchange of two lots, a dwelling house, and other improvements connected therewith, situated in Eagle Grove, Iowa, and then owned by her, for the northeast quarter of the northwest quarter of a certain section of land in Kossuth County which he (Wehrheim) then



claimed to own, but which, in fact, did not belong to him, although he almost immediately after the exchange was agreed upon did acquire from the defendant Moorehouse, paying him the sum of \$400 therefor. The valuation of each property was fixed at \$1,800, and plaintiff agreed to deed her property free and clear of all incumbrances. As a matter of fact there was a \$325 mortgage on the Eagle Grove property held by a relative of plaintiff, which it was agreed should be removed from the property and transferred to the Kossuth County land as soon as the trade was consummated. This was done after plaintiff got the deed to the Kossuth County land, and the mortgage amounted, as we understand it, to \$336.95. Not long thereafter plaintiff discovered that she had been egregiously defrauded by defendants Wehrheim and Bolster (the latter being connected with Wehrheim in the matter), and she immediately served a written notice of rescission upon them, demanded a deed for the Eagle Grove property, offered to procure a release of the mortgage placed by her upon the Kossuth County land, and to make a deed back to Wehrheim for the said land. As we understand it this latter deed accompanied the notice of rescission. Defendants refused to reconvey, and this action was then brought by plaintiff to secure a reconveyance of her Eagle Grove property, or, if that could not be had, that she be given judgment for the sum of \$1,800 and other equitable relief. Thereafter she filed an amendment to her petition, making the Waddells parties defendant, and omitting the name of Moorehouse, in which she asked practically the same relief—that the conveyance by Wehrheim to the Waddells be set aside, and that, in the event that could not be done, she have judgment against Wehrheim and Bolster for the sum of \$1,800 and other equitable relief. In her substituted petition plaintiff made the following allegations: “That plaintiff did not learn the real character of said land until about the middle of March, 1907,

whereupon she immediately tendered to Wm. Wehrheim a deed for said land in Kossuth County and demanded a reconveyance of the property which she had conveyed to him; that this demand was refused by said Wehrheim; that plaintiff has heretofore tendered into this court a deed for the use of said Wehrheim for said land, and plaintiff states that she is still willing to deliver said deed to Wehrheim and still keeps said tender good; that Exhibit C hereto attached is a copy of the notice of rescission. Plaintiff states that, at the time of making the contract herein referred to, there was a mortgage of \$350 upon her Eagle Grove property; that the contract required her to convey the property free from incumbrance; that, in order to do so, plaintiff removed said mortgage from the Eagle Grove property and placed it on the Kossuth County land; that plaintiff now offers to do equity with reference to said mortgage." She also asked in her prayer for an accounting of the rents and profits. Defendants Bolster and Wehrheim each filed answers denying generally, and defendants Waddell claimed to be good-faith purchasers of the Eagle Grove property from Wehrheim for value, and without notice of the fraud. The trial court found that no relief could be had against defendants Waddell, but rendered personal judgment against Bolster and Wehrheim.

Plaintiff has not appealed, and defendants Wehrheim and Bolster on their appeal do not question the finding of the trial court that they were guilty of fraud nor deny that the plaintiff was justified in rescinding the contract on account thereof. Their complaints are that the personal judgment was in too large a sum, and they also contend that the decree is erroneous because it did not order a reconveyance of the Kossuth County property to them free and clear of all incumbrance. They say in argument that, as plaintiff rescinded the contract for fraud, all that she is entitled to under this record is judgment

for the value of her Eagle Grove property, and that this should be conditional on a return by deed of the Kossuth County land. These propositions are sound, and as a general rule they will be enforced by a court of equity. *Fagan v. Hook*, 134 Iowa, 381; *Swayne v. Waldo*, 73 Iowa, 749; *Claude v. Richardson*, 127 Iowa, 623; *Primm v. Wise*, 126 Iowa, 528; *Hopwood v. Corbin*, 63 Iowa, 218. But courts of equity are not bound to give any stereotyped form of relief. They readily and easily adapt themselves to the situation of the parties and to the facts of the particular case, and may make such decrees as will effectuate justice. This is one of the reasons why a court of equity takes jurisdiction of such cases as this; the law furnishing inadequate and insufficient remedies. Equitable relief is always to be adapted to the facts and circumstances of the particular case. *King v. Ordway*, 73 Iowa, 735; *Creveling v. Banta*, 138 Iowa, 47; *Hale v. Kobbert*, 109 Iowa, 128.

Of course, upon rescission plaintiff is entitled to no profits for her supposed bargain. In such cases she is entitled to the return of her property, or to its value if its reconveyance can not be had. It is difficult to tell from the record just the amount of the incumbrance upon the Eagle Grove property when plaintiff conveyed it to Wehrheim. In one place it is stated to have been \$350, and in another at \$325; but, as plaintiff herself said on the witness stand that it amounted to \$325, we shall treat that as the true sum due on the mortgage. By agreement this was transferred to the Kossuth County land, and the incumbrance upon the Eagle Grove property was thus removed. Here again we have the same difficulty regarding the amount of the mortgage placed by plaintiff on the Kossuth County land; but, as she stated in her notice to defendant of rescission that it was \$336.95, we must treat that as the true sum. In equity plaintiff was entitled to be made whole. She testified that, at the time she served

her notice of rescission, she could have induced her relative who held the mortgage upon the Kossuth County land to have transferred it to the Eagle Grove property, if defendant Wehrheim would redeed it to her, but that, since she could not get back her property, she could not get a release of the mortgage upon the Kossuth County property which she had executed pursuant to the exchange. It appears that she signed the note which the mortgage was given to secure, and that she is obligated to pay the same in any event. Now the judgment rendered by the trial court was for \$1,325. Adding to this the \$336.95, we have the sum of \$1,661.95 as the value of plaintiff's Eagle Grove property at the time of the exchange, saying nothing of interest or rents and profits of the property during the time plaintiff was deprived of its use. The evidence shows that the Eagle Grove property alone was fairly worth that sum at the time defendants perpetrated the fraud upon her, and defendants have no reason to complain of the amount of the judgment. They are in no manner prejudiced by reason of the mortgage upon the Kossuth County land, for they are given credit to the amount thereof in the judgment rendered; but, subject to this incumbrance, they are entitled to a reconveyance of the Kossuth County land.

Here again we find the record quite obscure. From the allegations of the petition it will be seen that plaintiff alleged a tender of the deed into court, and a willingness on her part to deliver the deed to Wehrheim, and a statement that she still kept the tender good. This was denied generally by the defendants. We also find in the record a paper called "Exhibit 6," which is a warranty deed from plaintiff to defendant Wehrheim, over date of March 27, 1907, which was a few days before plaintiff commenced her suit. The only reference to this in plaintiff's testimony is that she executed it on the day it bears date, and it further appears that the deed was offered in evidence.

Probably this is the deed referred to in the notice of rescission, and also the one to which reference is made in the petition; but it does not sufficiently appear from the record that this is the one, that it was ever offered to defendants, tendered to them in court, or deposited there for their benefit. Under the issues there should have been some order made with reference to it. The Kossuth County land was not entirely worthless, as plaintiff's counsel assume. The testimony is in sharp dispute regarding its value; some of the witnesses placing it as high as \$1,000. We do not think it was worth that much, but, if not valueless, defendants were, upon rescission, entitled to a reconveyance of the Kossuth County property, subject, as we think, to the mortgage placed thereon by the plaintiff. Defendants are not, however, entitled to a straight warranty deed from plaintiff, for the incumbrance placed thereon by her must, for reasons already stated, be treated as a valid one. At most defendant Wehrheim upon paying the judgment rendered against him is entitled to a special warranty deed from plaintiff, excepting taxes and the mortgage placed thereon by her.

The decree should have so provided, and it will be modified to this extent and remanded for one in harmony with this opinion. As each of the parties is about equally benefited by this appeal, the costs will be equally divided between appellants and plaintiff as appellee.—*Modified and remanded.*

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BANKERS SURETY COMPANY, Appellant, v. ARTHUR H. WYMAN ET AL., Appellees.

**Estates of decedents: SURETIES: CONTRIBUTION: NEW BOND: PRIMARY LIABILITY.** While the giving of a new executor's bond does not ordinarily of itself release the old one, but the sureties thereon are treated as co-sureties and are liable to each other for contribution in proportion to their respective liability, still a new bond may be given under such circumstances that the sureties thereon

undertake a primary liability: as where the surety on the original bond was the husband of the testatrix who died and his estate was about to be settled and distributed, and the obligees as beneficiaries of the husband's estate were thus in effect sureties for themselves as beneficiaries of their mother's estate, the new bond being given under an order of court directing its filing and a discharge of the sureties on the old one to which no exception was taken, the obligation of the new surety became the primary and only liability as such.

**Same:** NEW BOND: APPLICATION FOR. Where an estate is pending and unsettled and the executor is required by an order of court to give a new bond because of the death of the surety on the old bond, it is not material to the proceeding that the heirs appear and make application therefor.

**Same:** DISCHARGE OF OLD BOND. The giving of a new executor's bond in compliance with an order of court is an assent to the further provision of the order discharging the old one upon filing the new one.

**Same:** NOTICE. The surety on an executor's bond given in conformity with an order of court is required to take notice of matters contained in the order.

**Sureties:** CONTRIBUTION: LACHES. The surety on an executor's bond must guard his own right to contribution from prior sureties, as this duty does not devolve upon the beneficiaries of the estate: and where he neglects to do so he will lose any right he may have had by laches.

**Supersedeas bond:** ENFORCEMENT OF JUDGMENT: INJUNCTION. Upon the rendition of a judgment against an executor the surety on his official bond agreed to indemnify another surety on his *supersedeas* bond given to perfect the appeal, in which the *supersedeas* surety agreed to perform the judgment of the supreme court. *Held*, that the liability of the *supersedeas* surety was primary and operated to the benefit of the surety on the executor's bond; and the judgment having been affirmed the surety on the executor's bond had no such interest in the matter as would authorize it to enjoin the collection of the judgment from the *supersedeas* surety.

**Suretyship:** SUBSTITUTION: CONTRIBUTION. Where the surety on an executor's substituted bond gave an indemnifying bond to secure the executor's surety on a *supersedeas* bond, such indemnifying bond was not binding on the estate of the first surety, even if the estate was liable to the substituted surety for contribution.

**Same.** Contribution between sureties is not dependent upon privity or knowledge, and the sureties need not be parties to the same

instrument; but it is essential that they be bound by the same principal and for the performance of the same duty.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

THURSDAY, MARCH 11, 1909.

ACTION in equity to enjoin the collection of a judgment against a surety. There was a decree in the lower court dismissing the petition. The plaintiff appeals.—*Affirmed.*

*B. J. Cavanaugh and Parker, Hewitt & Wright, for appellant.*

*Crom Bowen and Henry H. Griffiths, for appellees.*

EVANS, C. J.—On the face of it, this case is very complicated in its facts and legal questions. A condensed statement of the pleadings alone covers seventy-five printed pages in the abstract, and the case is submitted to us upon briefs covering more than three hundred and fifty pages. At the heart of it, however, there is less complication. It involves the question whether a surety on a new executor's bond, ordered by the court for the stated purpose of discharging the original bond because of the death of the surety thereon and the pendency of his estate in probate, may nevertheless require contribution from the estate of the surety on the first bond; and, if so, whether such contribution may be worked out after the closing of such first surety's estate through the beneficiaries thereof, such beneficiaries being also the obligees and beneficiaries of the bond of the last surety. It involves the question, also, whether a supersedeas bond, filed by the executor on appeal to the Supreme Court, from the judgment of the lower court fixing his liability, is primarily liable for the

amount of the judgment upon affirmance; and, if so, whether the surety on the new executor's bond has any interest as such in enjoining the surety on the supersedeas bond from paying the judgment, it being made to appear that such surety on the supersedeas bond holds an indemnifying bond, executed by the complainant surety; such indemnifying bond having been executed by the complainant surety in order to enable the executor, its principal, to stay proceedings on appeal to the Supreme Court, and before any payment had been made by the surety itself, and before any judgment had been rendered against it. To put the question in another way, if the complainant surety must answer the call of its indemnifying bond to the surety on the supersedeas bond, can it enforce contribution against the surety on the original executor's bond?

On or about May, 1883, one Lewis was appointed by the district court of Polk County as executor of the estate of L. S. Wyman. He executed a bond for \$5,000, with John Wyman, surviving husband of L. S. Wyman, as his surety. Mrs. Wyman left as the beneficiaries of her estate an infant son, Arthur Wyman, and two daughters, Anna and Nettie, who will be referred to in this opinion as the Wyman heirs. The estate was kept open and pending until the youngest child should become of age, which majority occurred shortly prior to May, 1904. In the meantime, in May, 1903, John Wyman died testate, in Polk County, leaving surviving him his widow, Bina M., and the three children of L. S. Wyman, already named, and Mabel Wyman, a daughter of the second marriage, all of which were left as beneficiaries of his estate. Defendant Bowen was appointed by the district court of Polk County as executor of his will soon after his death. In pursuance of section 3268 of the Code, the clerk of the district court, in January, 1904, noted his disapproval of the executor's bond in the L. S. Wyman estate, because of the death of the surety and because his estate was being



administered, and placed the "matter upon the calendar of the court at the next term for a proper order." On June 25, 1904, in response to the disapproval of the clerk, the executor filed a report. On the same day the court entered an order "that a new bond be given by the executor in the sum of seven thousand dollars, to be approved by the clerk of this court. And upon the filing of such bond the old bond is released and discharged." In pursuance of said order, the executor procured a new bond for \$7,000 with the Bankers' Surety Company, complainant herein, as his surety, and the same was then and there filed and approved by the clerk. On November 9, 1904, the executor filed a purported final report. On December 2, 1904, exceptions were filed to it by the Wyman heirs. December 16, 1904, the executor filed an amended report. December 30, 1904, further exceptions were filed by the heirs. This was the beginning of a controversy between the Wyman heirs and the executor, Lewis, as to the amount with which he should be charged as such executor. This controversy culminated in a judgment entered by the court on September 10, 1906, holding the executor liable in the sum of about \$6,000. From this judgment an appeal was perfected by the executor Lewis to the Supreme Court on October 5, 1906, no *supersedeas* bond being then filed. In the meantime the estate of John Wyman had been fully administered upon and was closed in due form, and the executor discharged on May 25, 1905. On December 28, 1906, the Wyman heirs filed an application for judgment on the bond against the complainant surety company, in pursuance of section 3361. On January 25, 1907, the complainant surety filed its petition in equity in the case at bar, asking that the Wyman heirs be enjoined from prosecuting their summary proceeding under section 3361. The contention urged was that John Wyman was a co-surety with the complainant and liable to contribution, and that the Wyman heirs had received all of

his estate, and that they had therefore been fully indemnified by reason of his suretyship, and that they were not entitled to recover again from the complainant surety; but if such contention be not sustained, then that the complainant surety was entitled to contribution from the estate of John Wyman, and that such contribution should be charged against the Wyman heirs as the beneficiaries of his estate. Substantially the same matters were set up in defense to the application of the Wyman heirs for a summary judgment.

On February 16, 1907, the executor, Lewis, filed a *supersedeas* bond in his appeal to the Supreme Court, and thereby stayed all proceedings pending the appeal. Thereupon the Wyman heirs dismissed without prejudice their application for summary judgment, and all proceedings in the lower court slept for the time being. On May 8, 1907, the judgment of the lower court was affirmed on appeal, the appellant having failed to file an abstract within the statutory time, and judgment was then entered against the United States Fidelity & Guaranty Company, the surety on the *supersedeas* bond. Upon this judgment execution issued. Thereupon, on May 11, 1907, the complainant, Bankers' Surety Company, paid in to the clerk of the district court the amount adjudged against the *supersedeas* bond in the Supreme Court, and at the same time filed an amendment to its petition, making the clerk of the district court and the sheriff of Polk County, and the clerk of the Supreme Court, all parties defendant, and asking for a temporary injunction to restrain the collection of the judgment of the Supreme Court upon the *supersedeas* bond, and to restrain the clerk of the district court from paying out to the Wyman heirs the money which the complainant had itself paid in. It obtained a temporary injunction to this effect, which was continued in force until the hearing of the case upon its final merits. In this amendment the complainant Bankers' Surety Com-

pany also alleged an interest in restraining the collection of the judgment against the United States Fidelity & Guaranty Company as surety on the *supersedeas* bond, in that it had executed an indemnifying bond to the said United States Fidelity Company to protect it against such payment. It should have been stated earlier in this narrative that the complainant became a surety on the executor's bond for hire, and that the cost of such suretyship was charged and allowed against the estate, and therefore borne by the Wyman heirs, its beneficiaries. This will suffice for the present as a brief statement of the controlling facts in the case.

I. The appellee challenges the regularity of the procedure adopted by the complainant, in that it has resorted to most extraordinary remedies. We will pass that

1. ESTATES OF  
DECEDENTS:  
sureties:  
contribution:  
new bond:  
primary  
liability.

question for the present. It is undoubtedly true that the giving of an additional bond by an executor does not ordinarily, in and of itself, release a prior bond. It is also true that, where successive bonds remain in full force and effect the sureties thereon may be deemed as co-sureties and be liable to each other for contribution in proportion to their respective liabilities on their respective bonds. It does not follow, however, that a surety on a new bond may not undertake a primary liability, and we think that is the position of the complainant surety in this case. The circumstances which called for the new bond are somewhat out of the ordinary. The surety on the original bond was dead. His estate was about to be distributed and closed. The beneficiaries and obligees of the original bond were also beneficiaries and distributees of the John Wyman estate. If there should be any default on the part of the executor, the estate of John Wyman would be liable for it, and the amount of such liability would of course reduce the amount to be distributed to its beneficiaries. In a sense, therefore, the Wyman heirs, as beneficiaries of their

father's estate, were sureties to themselves as beneficiaries of their mother's estate. The real net result of such a situation was that they were left without a surety on the executor's bond. This was the situation observed by the clerk while acting under the provisions of section 3268 of the Code. This was the situation which confronted the district court when it was called upon under this section of the statute to make a "proper order."

The fact that the Wyman heirs did not personally appear in the proceedings, nor make any application in their own behalf, is to our minds quite immaterial. The estate was pending and unsettled, and, while

2. SAME: new bond: application by heirs. so pending and unsettled, they were the wards of the court. The executor was pre-

sumably notified and was in court. The order made was directed to him. It required that he file a new bond to the amount of \$7,000 to be approved by the clerk. It further ordered then and there that upon the filing of such bond the old bond be released and discharged. The executor took no exception to this order. The beneficiaries themselves have never complained of it. In compliance with this order, the executor executed a new bond and hired the complainant to become surety thereon. At the time the complainant became such surety, the order of the court releasing and discharging the old bond was a matter of record in the case. The presentation of the new bond in compliance with such order of the court must be deemed as a consent to the conditions of such order. It was en-

3. SAME: discharge of old bond. ant surety. It fixed its premium in accord with the liability incurred. The obligees

of its bond were the beneficiaries of the L. S. Wyman estate; the undertaking was entered into expressly for their benefit. The cost of it was borne by them. In reliance upon this bond, the executor was permitted to continue in charge of the estate, and the John Wyman estate

proceeded to its final distribution. To say now, as the appellant does, that these Wyman heirs should be deemed to have continued as their own sureties by reason of their interest in their father's estate, and that they should be deemed to have been fully indemnified by reason of having received their father's estate, is a most inconsistent position. If this position be correct, it was an idle and expensive ceremony for the court to require a new surety at all. The position contended for is contradictory to the very terms of the bond, in that the bond by its terms purports to be made for the benefit of the very persons who are now claiming thereunder. If they have no right to do so now, then the bond was nugatory from the beginning. The interest and ownership of these beneficiaries in the John Wyman estate existed at the time this bond was executed. If this fact is a defense to the bond now, it was a defense to it when it was made.

True, the appellant charged fraud. But the evidence does not furnish the slightest support for this charge. It is quite apparent from the record that the heirs had no  
4. SAME: apprehension or ground of apprehension of  
notice. any future difficulty between them and the executor, nor do we think that the executor had any apprehension of any such difficulty. It is not claimed by either side that the executor was guilty of any fraud. He was confessedly without property, and so stated in his application to the appellant. Complainant's alleged ignorance of the state of the record can not be considered; it had no right to be ignorant in that respect, nor did the obligees of the bond have any knowledge of its ignorance. We hold, therefore, upon this branch of the case, that the complainant surety must be held to have undertaken a primary liability, and that it can not contradict the terms of its bond by claiming contribution from the obligees thereof, and, as to it, the original bond must be deemed discharged. And this is so, regardless of whether the action of the

court in ordering such discharge was regular or not. For the purpose of this case, such action of the court must be deemed a "proper order" within the meaning of section 3268. *Wilborne v. Commonwealth*, 5 J. J. Marsh. (Ky.) 617.

We may say, further, that we see no equitable circumstances proved in this case which would justify the opening up of the John Wyman estate for the purpose of enabling the plaintiff to prove a claim for contribution against it. If it had a right to contribution, it lost it by its own neglect.

5. SURETIES:  
contribution:  
laches.

The report of the executor was challenged by the heirs by written exceptions filed six months prior to the closing of the John Wyman estate. The beneficiaries of that estate owed no affirmative duty, as argued by counsel, to protect appellant against the contingency of liability for contribution. It devolved upon the defendant itself to guard its right of contribution, if it had any. *Fidelity Co. v. Bowen*, 123 Iowa, 356; *Ellyson v. Lord*, 124 Iowa, 125.

II. If we should assume that the appellant surety company had a right of contribution against the John Wyman estate, has it any right as such surety to enjoin the collection of the judgment against the executor from the United States Fidelity Company, the surety on the *supersedeas* bond?

6. SUPERSEDEAS  
BOND:  
enforcement  
of judgment:  
injunction.

It is clear to us that it has no ground to stand upon at this point. The *supersedeas* bond, to all legal intent, was filed by the executor to stay proceedings pending the appeal. By its very terms the surety thereon undertook to perform such judgment as the Supreme Court should order. The liability of the surety on the *supersedeas* bond is primary, and operates to the benefit of the surety on the executor's bond. If the judgment can be collected, either from the executor or from his surety on the *supersedeas* bond, it will relieve the surety on the executor's bond of all liability; nor can contribution be de-

manded from it by a *supersedeas* surety. *Fidelity Co. v. Bowen*, 123 Iowa, 356. It is manifest, therefore, that, as a mere surety upon the executor's bond, the appellant has no interest to subserve by enjoining the collection of the judgment from the surety on the *supersedeas* bond.

It appears, however, that, before the surety of the *supersedeas* bond entered into its undertaking, the appellant entered into an undertaking with it, agreeing to indemnify it against loss. It is its liability on

7. SURETYSHIP:  
substitution:  
contribution.

this bond which creates an interest in the appellant adverse to the collection of the bond from the United States Fidelity Company. But this undertaking is entirely distinct from the executor's bond, signed by it July 25, 1904. If the John Wyman estate had been liable to contribution as a co-surety, it had a right, nevertheless, to rely upon the *supersedeas* bond filed by the executor. If the appellant entered into a new undertaking and undertook a new obligation, the John Wyman estate was not bound by that undertaking.

Appellant's argument is that it was its duty to use its utmost efforts to reverse the judgment obtained against the executor, and that it executed the indemnifying bond in pursuance of such duty. If that argu-

8. SAME.

ment should be deemed sound, it would be quite fatal to the plaintiff in this case. If it owed the duty to use its best efforts to secure a reversal of the judgment against the executor, it signally failed in that duty. It failed to file an abstract within the time allowed for that purpose, so that no review of the case was possible here. But the argument is not well taken. As between it and the co-surety, it could not change the nature of its liability and still maintain its right of contribution. While it is true that the right to contribution between sureties is not dependent upon privity or knowledge, nor need they be signers upon the same instruments, it is essential for the purpose of contribution that the sureties be bound

for the same principal and for the performance of the same duty.

No judgment has been entered in this case against the appellant, nor are the beneficiaries of the bond pressing any proceedings against it. For the present they choose to rely upon the *supersedeas* bond. True, the appellant did of its own accord pay in to the clerk of the district court the alleged amount necessary to discharge the liability of the executor, but it immediately tied it there with a temporary injunction. That injunction having been dissolved by the decree of the lower court, and the judgment against the United States Fidelity Company being still in force in this court, the appellant urges that the beneficiaries will reap a double satisfaction of their judgment. We shall have little trouble in protecting the appellant by proper order against a double payment.

The Wyman heirs are not now proceeding against the appellant surety company. The real question before us is whether the plaintiff may maintain its manifold injunctions against the various officers of the district court and of this court, and whether it can restrain the collection of the judgment entered in this court against the surety on the *supersedeas* bond. We hold that it can not.

The trial court rightly dissolved all the injunctions and dismissed plaintiff's petition. Its decree is therefore *affirmed*.

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GEORGE LEWIS v. HUGH BRENNAN, Judge, Defendant.

**Intoxicating liquors: NUISANCE: ABATEMENT: CLOSING OF PREMISES.**

- 1 Upon the establishment of a liquor nuisance either in a civil or criminal case the order of abatement to be entered under the statute as a part of the judgment requires the effectual closing of the building for any purpose for the period of one year: there is no authority for decreeing that the building shall be closed so far as the sale of liquor is concerned, and at the same time used for



other lawful purposes, unless released by giving bond as provided in the Code.

**Same: Certiorari: FAILURE TO RETURN RECORD: REVIEW.** Upon *certiorari* to review contempt proceedings in which defendant was not found guilty of violating an order restraining the illegal sale of liquor, where no transcript of the record upon which the findings were based was returned and no affirmative finding upon which the inference of guilt could rest, the discharge of accused must be regarded as conclusive of the matter.

**Certiorari: REHEARING: COSTS.** On a rehearing in *certiorari* the cause must be submitted on the record as it stood at the former submission, although affidavits have been since filed, and such affidavits will be stricken at the cost of the party filing the same.

*Certiorari to Polk District Court.*

FRIDAY MARCH 12, 1909

A DECREE was entered in the district court of Polk County permanently enjoining J. C. Cain and Minnie Cain from keeping, using and maintaining the premises described, to wit, lot 8, in block 8, in Enterprise, Polk County, as a nuisance, and from selling or keeping for sale therein, or anywhere in said county, intoxicating liquors, and a writ of abatement was ordered to "be issued in this cause directed to the sheriff of this county directing and commanding him forthwith to seize all the intoxicating liquors of whatever kind found in said building or upon said described premises, and destroy the same, together with the vessels containing such liquors, and that he levy upon and advertise and sell such fixtures found in said building and used in maintaining said nuisance, as provided by law. . . . And the sheriff is further ordered to effectually close said building against the use for the keeping or sale of intoxicating liquors, and keep it securely closed for the period of one year, unless sooner released as provided by law." On January 14, 1908, Minnie Cain moved that the decree be so modified that the building be

used for lawful purposes, supporting the same by a showing that J. C. Cain had departed this life; that she had never willfully violated the liquor laws; that she could rent the property for legitimate purposes, and was in need of the income for the support of her family. The motion was overruled, for that the building was "closed as provided by the decree of Judge Howe as to the unlawful sale or keeping for sale of intoxicating liquors." On February 11, 1908, information was filed, charging that Minnie Cain, Hal Ferguson, and F. E. Montgomery had entered the building and used it in violation of the decree. These parties were brought into court on precept duly issued, and on such hearing as was had an order entered that the court;

Having heard the statements of counsel and the admission of the parties, in open court, finds that the building described has not been used for any illegal or unlawful business, and the court further finds that heretofore, on the 18th day of January, the defendant Minnie Cain submitted to the court a motion to modify the decree of injunction heretofore entered in the case of *W. C. Barber v. J. C. Cain*, and that upon said hearing this court refused to modify said decree, but declared on said hearing that the injunction granted in said case provided only against the unlawful sale or keeping for sale of intoxicating liquors, and that the injunction as so construed by this court has not been in any way or manner intentionally violated by the defendants herein. And the court further finds that at the time of the granting of the injunction referred to the attorney for the plaintiff presented and insisted upon a decree forbidding the use of the premises referred to in the information herein for any use for the period of one year, and that at said time the judge granting the injunction refused to grant a decree for any purpose except for the purpose of forbidding the sale of intoxicating liquors or keeping the same for sale upon said premises, and that no exception was taken of said decree, and that same has never been changed, modified or reversed. And the court further finds that the said premises

were closed upon the verbal order of the judge granting said decree, with verbal instructions to the sheriff that the closing of said building should be temporary only. The court further finds that the defendant Minnie Cain, wife of the late John C. Cain, has not sold intoxicating liquors upon said premises, nor kept the same for sale thereon, and that she never did anything relative thereto except under the directions of her late husband, and the court further finds that J. C. Cain, husband of said Minnie Cain, departed this life in December, A. D. 1907, and that the said Minnie Cain is the mother of six minor children, depending upon her for support, and that the use of said building is the sole means of support of the said Minnie Cain and her children. And it appearing to the court that the defendants and each of them has in no manner willfully or intentionally violated the terms and provisions of the decree or injunction referred to, and that the plaintiff has failed to establish each and all of the allegations of the information herein, upon which the defendants were cited to appear in this court, it is therefore ordered and adjudged that the defendants and each of them be, and they are hereby, discharged.

Thereupon this proceeding in *certiorari* was begun to test the legality of the order.—*Dismissed*.

*Dunshee & Dorn*, for plaintiff.

*W. A. Spurrier*, for defendant.

LADD, J.—The decree which the accused are said to have violated ordered the sheriff “to effectually close said building against the use for the keeping or sale of intoxicating liquors, and keep it securely closed

1. INTOXICATING  
LIQUORS:  
nuisance:  
abatement:  
closing of  
premises.

for the period of one year, unless sooner released as provided by law.” Subsequently one of the defendants therein asked that it

be modified, so as to permit occupation of the building for other purposes, but the application was denied, with the

significant statement that "the building is to be closed . . . as to the unlawful sale or keeping for sale of intoxicating liquors." No bond appears to have been tendered, as exacted by section 2410 of the Code, and permission to open was not sought thereunder. The application was for a modification of the decree directing the building to be closed, entered in pursuance of a mandatory statute. *McClure v. Braniff*, 75 Iowa, 38; *McCoy v. Clark*, 109 Iowa, 464. The motion then was rightly overruled. The court was not called upon for an interpretation of the decree, and, if an erroneous reason for a correct decision was given, it did not impinge upon the nature or effect of judgment as actually entered. Just how the sheriff could effectually close this building against the use for keeping or selling of intoxicating liquors, and keep it securely closed without doing so for all purposes, we can not understand. "Effectually" means, according to the lexicographers, "in an effectual manner; with complete effect; so as to produce or secure the end desired; thoroughly." If the building is not to be closed for all purposes, what is the sheriff to do? How close it against the sale or keeping for sale of liquors, and so securely keep it for a year, and yet leave it open for all other purposes? Is he to clear the building of the objectionable commodity, and leave a deputy on guard to scrutinize all that is brought in the building during the year? No provision warranting this course is to be found in the Code, and therefore the only reasonable construction of the decree is that given the statute, of which it is a substantial copy. Section 2408 of the Code provides that: "If the existence of the nuisance be established in a civil or criminal case an order of abatement shall be entered as a part of the judgment in the case, which order shall direct . . . the effectual closing of a building, erection or place against its use for any purpose prohibited in this chapter and so keeping it for a period of one year unless sooner released. If any one

shall break or use a building or place so directed to be closed he shall be punished as for contempt as provided in the preceding section." It will be observed that the language of the decree is like that quoted from the statute, save that in the former the "purpose prohibited in this chapter" is specified, and the closing is emphasized by the word "securely." If, then, the section quoted means that the building is to be closed for all purposes, this decree must be so interpreted.

In *McCoy v. Clark*, 109 Iowa, 464, the form of a decree was presented to the court, directing that the sheriff "effectually close said building against its use, for any purpose prohibited by title 12, chapter 6, of the Code of Iowa, as the same is now in force, and so keep it closed one year, unless sooner discharged." To this was added by the court, "But not as against any other use or purpose"; and the decree entered as thus modified. Upon appeal, this court, in holding that the decree as presented should have been entered without the additional clause, said: "The building can not be effectually closed against the liquor traffic if it is open for the business that serves as a cover for that traffic. The language 'against its use for any purpose prohibited by this chapter' has reference to the cause for which the building is to be closed, rather than the manner of abating the nuisance. It is a nuisance because it is kept for purposes prohibited by that chapter, and the manner of abating the nuisance is by effectually closing it against all uses for the year, unless released under the provisions of section 2410. If this was not the legislative intent, why the provisions of section 2410 as to how the owner may release his property from the order? He can not release it as to the unlawful sale of intoxicating liquors; and, if it is not closed as to other uses or purposes, there is no necessity for the owner availing himself of the provisions of section 2410. If the building is not to be closed as against all uses, why the provision punishing 'any one who shall break or use the building so directed to be closed'? And

why compensate the sheriff 'for closing the premises, and keeping them closed,' if he is not in fact to do so? The decree, as presented by plaintiff's counsel, is in the language of the statute, and, as we construe the statute, would have the effect of effectually closing the building for one year against all uses, unless sooner released under the provisions of section 2410, and should have been approved." From the court's findings it is apparent that such was not the view of the law entertained, for therein it is pointed out that no intoxicating liquors had been sold, that the motion to modify had been overruled on the theory that only this was forbidden, that the judge entering the decree had orally interfered with its execution, and that the accused had not willfully or intentionally violated the injunction. They were bound to know that, after the closing of the building under the decree, they could not lawfully interfere therewith. Every one is presumed to know the law, and if the trial court in giving alleged reasons for not modifying the decree, which was in harmony with the mandate of the statute, or if the judge of the court entering the decree did not understand its effect, or, contrary to its terms, orally advised the sheriff to close the building temporarily only as is expressly found in this order, none of these matters justified the accused. It is notorious that bad reasons are often given for sound decisions; but no one is bound by them. The decision alone is controlling. Oral advice of a judge outside of court, like his oral orders not entered of record, are of no more consequence than the advice or order of any other equally good lawyer, save that, because of his position, these may command greater respect. *In re Guardianship of Kimball*, 127 Iowa, 665. Courts and judges can not be too cautious that officers and litigants be not misled in what may be said, and that decisions be so explicit that interpretation shall not be required, though always in harmony with the plain mandates of the law. Upon the execution of a prop-

er bond, the court could have ordered the building released, and this course would seem the more appropriate, where, as appears, the circumstances of the owner are such as to render it desirable that she have the income from the property.

As contended by plaintiff, the findings of the court proceed on the theory that the accused had been operating the building as alleged in the information, and that notwithstanding this they were not guilty, but it will be noted that there is no finding to this effect. No transcript of the "statements of counsel and the admission of the parties" on which the findings purport to have been based was returned, and, in the absence of any affirmative finding of facts on which the inference of guilt may rest, the discharge of the accused must be regarded as conclusive.

Several affidavits have been filed since a rehearing was granted; but, as the cause must be submitted on the record as it was on the former submission, all these will be stricken at the cost of the party filing the same. *Hintrager v. Hennessy*, 46 Iowa, 600; *Coe College v. Cedar Rapids*, 120 Iowa, 541; *Martin v. Martin*, 125 Iowa, 73.—*Dismissed*.

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C. L. LUCAS ET AL., Appellants, v. E. C. PAYNE ET AL.

**Highways: ESTABLISHMENT.** Where a petition asked the establishment of a highway commencing at a designated corner and running along the section line for some distance, the establishment of one beginning at a point on the line some distance from the designated corner will not be presumed to be based on the petition.

**Same: ABANDONMENT: EVIDENCE.** A legally established highway may be abandoned, and in the instant case the evidence is held to show abandonment, conceding it had been established.

*Appeal from Boone District Court.*—HON. C. G. LEE,  
Judge.

FRIDAY, MARCH 12, 1909.

ACTION in equity to have a strip of ground about a half mile long and two rods wide declared to be a legally established highway, and to require the defendants to remove fences therefrom. There was a judgment for the defendants, from which the plaintiffs appeal.—*Affirmed.*

*Ganoe & Ganoe*, for appellants.

*Whitaker & Snell*, for appellees.

SHERWIN, J.—The appellants are heirs of Hiram Lucas, deceased, and as such are the owners of the northeast quarter of the northwest quarter of section 10, township 83, range 26, in Boone County, Iowa. The appellees are the owners of the land on both sides of the section line between sections 3 and 10, and 2 and 11. There is a public highway, known as the "State road," or "Dodge road," running north and south through the southwest of the southwest of 2 and the northwest of the northwest of 11, and the strip of land which it is claimed is a highway extends from this State road west along the section line to the northeast corner of the Lucas land heretofore described. The plaintiffs' petition is based upon three grounds: It is first claimed that the strip of ground in question became a highway by prescription; second, that it became a highway by an agreement made in 1858; third, that it was legally established as a highway in 1859. There is nothing in the first two grounds relied upon by the appellants, and we turn our attention to the claim that a public highway was established along this line between the points in question in 1859.

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In November, 1855, a petition was filed for a highway commencing at the half-mile stake between sections 10 and 3, which would be at the northeast corner of the northeast quarter of the northwest quarter of section 10, and thence running east on the section line to the northeast corner of section 12 in said township. No action seems to have been taken on this petition, the records of Boone County failing to show any further reference to it. On the 1st day of November, 1858, however, there was filed with the county judge of Boone County, Iowa, a consent petition asking the establishment of a county road forty-four feet wide commencing at the southwest corner of section 2 in the same township and range, thence running east along the section line for some distance. It will be noticed that this last petition, asked for a highway to commence half a mile east of the point of commencement named in the petition of 1855. This petition seems to have been lost and was only found a short time before the commencement of this action, as we understand the record. Both of these petitions were signed by Hiram Lucas and T. A. Duckworth, but the petition of 1855 was not signed by John Latham, Lewis Doran, or Solomon McClain, as was the petition filed November 1, 1858. On the 28th of May, 1859, an order was made and entered by the county judge of Boone County, which recited "That, whereas on or about the first Monday of December, 1858, T. A. Duckworth, Hiram Lucas, John Latham, Lewis Doran, Solomon McClain et al. filed a petition asking the establishment of a county road to commence at the one-half mile stake between sections 3 and 10 in township 83 north, of range 26 west, thence to run east on the section line to the N. E. corner of section 9 in township 83 N. of range 25 W., and said road to be thirty-three feet wide, and whereas said petition was and has been lost or mislaid so that final action was not had upon it at the time set for the same. . . . It

is therefore ordered . . . said road be and the same is hereby granted." This is the only record showing the establishment of the highway in question, and it is quite evident from the record itself and the petitions to which we have referred that it was an attempt to establish a road on the petition filed November 1, 1858, and, if it be true that the road then established was established on said petition, it is equally as true that it did not establish a highway from the northeast corner of the plaintiffs' land, because the petition asked that the road commence at a point one-half mile east thereof; but if it be conceded that the evidence is sufficient to show the establishment of the highway from the point claimed by the appellants, they are still in no position to claim that the highway existed there at the time this suit was brought. No one claims that the highway had ever been opened up or worked for the use of the public west of the north and south State road to which we have already referred. There is evidence tending to show that one of the appellants expended a part of his road tax in making a way for his own use over a low piece of ground along this line; but it is shown that, at the time he performed this labor, he held a lease of a right of way over the land in question, which lease had been made by Jennings, the owner of the land north thereof. So far as the record shows, the general public had never used this way. There was a fence along the section line or on a line near thereto a part of the distance between the points named in the petition of 1859 at the time it is claimed the road was established. The fence has remained there practically all of the time since then, and the owners on both sides of the section line have occupied and used their land without reference to the highway all of the time from 1859 down to the present time. Until 1901 the appellants' land was unimproved. It was timber land, and the only use made thereof was in connection with the removal of the timber for ordinary use.

In 1901 a house was built on said land, and since that time it has been occupied by some of the appellants. For about thirty years none of the appellants knew that a highway had been established there, or that any attempt had been made to establish one, and since they learned of the record to which we have referred they have used and occupied their property the same as they did before.

That a highway which has been duly and legally established may be abandoned by the public and its rights therein lost is settled beyond any controversy by our own cases, and we are constrained to hold that the record in this case clearly shows that such an abandonment has taken place here, if there ever was a highway established there in fact. *Larsen v. Fitzgerald*, 87 Iowa, 402; *Weber v. Iowa City*, 119 Iowa, 633, and cases therein cited; *Carter v. Barkley*, 137 Iowa, 510.

The district court reached the right conclusion in this case, and the judgment must be, and it is, *affirmed*.

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MRS. JACOB L. ARNOLD, Appellee, v. MRS. JOHN LUTZ, Appellant.

**Slander and libel:** SLANDER *per se*. If used in a defamatory sense  
 1 the statement that plaintiff, a married woman, was too intimate with the hired man is slanderous *per se*, although the word "intimate" is capable of use in an innocent sense.

**Same:** EVIDENCE: INSTRUCTION. Persons to whom alleged slander-  
 2 ous words were spoken may testify as to the sense in which they understood the words to be used; and the jury is to determine whether the words were used in a defamatory sense.

**Instructions:** SEPARATE COUNTS. Usually it is better to instruct  
 3 upon separate counts in separate instructions, but where the evidence and instructions are direct and brief and the result is not confusing, a single instruction treating of both counts is not a matter of which complaint may be made.

*Appeal from Story District Court.*—HON. R. M. WRIGHT,  
Judge.

SATURDAY, MARCH 13, 1909.

THIS is an action for slander. Judgment for the plaintiff, and defendant appeals.—*Affirmed.*

*E. H. Addison* and *B. B. Welty*, for appellant.

*U. S. Alderman* and *Fitchpatrick & McCall*, for appellee.

EVANS, C. J.—The plaintiff brought her action in two counts. In the first, with proper *innuendo*, she charges the publication by defendant of the following alleged slanderous language: "Mrs. Arnold is too intimate with the hired man." In the second count she charges the publication of the following slanderous language: "Mrs. Arnold has been sleeping with the hired man." The first of these alleged slanders is charged to have been uttered on the 12th of June, 1906, and the second in the latter part of August or 1st of September of the same year. At the time of the publication of the alleged slanders the plaintiff was a married woman, living with her husband, who had in his employ a hired man. Plaintiff alleges in her petition that by the slanderous words set forth in each count the defendant intended to charge the plaintiff with having committed the crime of adultery with the said hired man. On the trial the plaintiff produced witnesses who testified in support of each count. Two witnesses testified that the defendant uttered in their presence the exact words set forth in the first count of the petition, and one witness testified that the defendant uttered in his presence the words charged in the second count of the petition, and on the date charged. A fourth witness testified that he worked

in defendant's family from February to December, 1906, and during that period he heard the defendant make the statement charged in count 2 of the petition. The defendant's principal complaint on appeal is that the words charged in the first count of the petition are not slanderous *per se*, and that, no special damages having been pleaded or proved, such count should not have been submitted to the jury. This objection was urged to the court below in the form of objections to evidence and exceptions to instructions. The contention is that the word "intimate" is capable of an innocent meaning, and that there is nothing in the record to justify a finding that it was used in any other sense by the defendant, and that if the same was in fact used in a defamatory sense, no recovery could be had without pleading and proving special damages.

The words under consideration were slanderous *per se*, if slanderous at all. Granted that the word "intimate" is capable of an innocent meaning, it is also capable of use in a defamatory sense. If the defendant intended its use in a defamatory sense, then it was defamatory and slanderous *per se*. *Colins v. Dispatch Co.*, 152 Pa. 187 (25 Atl. 546, 34 Am. St. Rep., 636); *Wilcox v. Moon*, 63 Vt. 481 (22 Atl. 80); *Craver v. Norton*, 114 Iowa, 46; *Wimer v. Allbaugh*, 78 Iowa, 79.

The witnesses were permitted to testify to the conversation with defendant in which these words were spoken. They were also permitted to state the sense in which they understood them. To this evidence the defendant objected, and urges that the admission thereof was error. The ruling of the court was correct. *Barton v. Holmes*, 16 Iowa, 258; *Craver v. Norton* and *Wimer v. Allbaugh*, *supra*. In its instructions the court required the jury to determine whether the words were used in a defamatory sense. Such

1. SLANDER AND  
LIBEL: slander  
*per se*.

2. SAME:  
evidence:  
instruction.

instruction was not only proper, but necessary, under the rule already stated.

In the third instruction the court instructed briefly that the plaintiff must prove the material allegations of one cause of action or the other before she could be entitled to recover. In the eighth instruction

3. INSTRUCTIONS:  
separate  
counts.

the court instructed more at length as to what it was necessary for the plaintiff to prove in order to recover in each cause of action; but it covered both counts by the same instruction, and the defendant complains of this on the ground that it tended to bring one count to the support of the other, and to make proof of one corroborative of the other. While it is ordinarily true that clearness of statement is best attained by dealing with separate counts in separate instructions, this case presents no difficulty of that kind. The evidence was direct and very brief, and the ground to be covered by the instruction was very limited. The instruction was brief as it was. The coupling of the two counts did not result in confusion to any extent, and we see no meritorious ground of complaint for the defendant.

We find no error in the record. The judgment below must be *affirmed*.

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ANNA TOMLIN, Appellant, v. CEDAR RAPIDS & IOWA CITY  
RAILWAY & LIGHT COMPANY.

**Municipal corporations:** VACATION OF STREETS: ORDINANCES: CONSTRUCTION OF STREET RAILWAY: DAMAGES. An ordinance vacating a portion of a street, granting its use for right of way purposes and conveying the fee to the state, is not objectionable as embracing more than one subject, since its purpose is to convey the fee subject to the easement: and as the street when vacated becomes in effect private property of the state subject to the right of way, the railway company may construct and operate its line over the same without procuring the usual franchise in such cases, and without compensation in damages to abutting property owners. Weaver, J., and Evans, C. J., dissenting.

*Appeal from Johnson District Court.*—HON. R. P.

HOWELL, Judge.

SATURDAY, MARCH 13, 1909.

THE opinion states the case.—*Affirmed.*

*O. A. Byington*, for appellant.

*John A. Reed*, for appellee.

SHERWIN, J.—The plaintiff stated in her petition that she was the owner of lots 7 and 8, in block 95, Iowa City, Iowa, and that said property abuts the east side of Front Street, in said city, between College and Burlington Streets; that in July, 1904, the defendant constructed upon said street in front of her property an electric inter-urban railway, which has since said time been in operation for the transportation of both passengers and freight; that she had suffered damages on account thereof which had not been paid. The defendant answered, admitting the construction and operation of the railway upon what was formerly the west one-half of said Front Street. It pleaded, however, that the west one-half of said Front Street between College and Burlington Streets was vacated by an ordinance of the city, and became the property of the State of Iowa for the use and benefit of the State university, and that the part of said street so vacated no longer constituted a public highway. The plaintiff demurred to the answer on the ground that the ordinance pleaded was void because it "contained more than one subject," and for the further reason that the ordinance does not grant the right to the defendant to use said street without paying damages to abutting property owners. The demurrer was overruled, and the plaintiff appealed.

The ordinance provided for the vacation of the west

one-half of Front Street for a specified distance, and then granted to the defendant the right to use the part so vacated for the purpose of constructing, maintaining, and operating its railway. It further provided "that the said west one-half of Front Street so vacated be and the same is hereby granted to the State of Iowa for the use of the State University of Iowa subject to the right of way herein granted to the Cedar Rapids and Iowa City Railway and Light Company, its successors and assigns." The ordinance vacated a part of the street, gave the defendant the right to use the part so vacated for right of way, and granted its use, subject to such right of way, to the State. The real subject of the ordinance and the only purpose for which it was passed was to grant an easement in the land to the defendant and a fee therein to the university. It related solely to the transfer of its estate in the street, although to different parties. An ordinance vacating a street and at the same time conveying it where the diversion is the real purpose thereof does not contain two subjects. *City of Marshalltown v. Forney*, 61 Iowa, 578; *Spitzer v. Runyan*, 113 Iowa, 619; *Dempsey v. Burlington*, 66 Iowa, 687; *Hanson v. Hunter*, 86 Iowa, 722. That a city may vacate streets and alleys and divert them to other uses has long been the rule in this State. *Harrington v. Railway Company*, 126 Iowa, 388; *Marshalltown v. Forney*, *supra*; *Lake City v. Fulkerson*, 122 Iowa, 569, and other cases. And, when a street is properly vacated, it ceases to be a street. The right of the public therein is divested, and for all of the essentials of this case it becomes private property. A State or municipality may hold property for uses distinct and independent of public uses, and, when property is so held, it becomes in effect private property. Elliott on Roads and Streets (2d Ed.) section 136. And, when a street ceases to be public by reason of its vacation, it is private property within the meaning of the law, and a road located thereon does not entitle an



abutting owner to damages. *Rinard v. Burlington & N. R. Co.*, 66 Iowa, 440; *Harrington v. Railway Co.*, *supra*. The ordinance in question conveyed to the defendant a right of way, and under the easement thus granted it had the right to construct and operate its road without the franchise necessary in case of the use of streets, etc. *Winklemans v. Railway Co.*, 62 Iowa, 11.

The demurrer to the answer was properly overruled, and the judgment must be *affirmed*.

WEAVER, J. (dissenting). I can not agree to any further extension of the doctrine approved in the case of *Marshalltown v. Forney*, above cited—a decision which I regard unsound in principle and out of harmony with a great majority of the established precedents. Under the rule of the majority opinion, a railway company unwilling to treat with property owners and desiring to avoid payment of damages occasioned to abutting property by the appropriation of a street for its right of way has only to persuade a complaisant city council to vacate the street, and make it a present of such way without cost to any one except to the owners of the lots thus injured. We have expressly held that, in the absence of legislative authority, cities and towns have no power to license or permit the use of its streets by steam-propelled cars or motors: *Stanley v. Davenport*, 54 Iowa, 463; *Stange v. Railway Co.*, 54 Iowa, 669. The only authority found in our statutes by which the city in this case could confer upon the defendant railway company the right to build its road along the street in question is in the provision of Code, section 767, which expressly declares that no such road shall be constructed in a public street until the damages to abutting owners shall have been assessed and paid. An ordinance which disregards this provision is void. *Stange v. Dubuque*, 62 Iowa, 303. And yet we now say that the city or its council by the cheap expedient of declaring the street

vacant and then presenting the way as a gift to the railway company may evade the law made for the protection of property owners. If this be a correct exposition of the law, the city may vacate a ten-foot strip along the middle of every street and highway within its boundaries, and issue a municipal *carte blanche* to all railways desiring an entry to come in, occupy, and enjoy at their pleasure without fear of liability for damages. For one I must decline to subscribe to such doctrine. Though a city may hold the title to the street in fee, it is not a fee in the sense in which we use that term to describe full ownership of real property by an individual. It is a holding in trust for public use. The city is vested with no authority to give away that title for the enrichment or private use of any corporation or individual. This principle has the support of authorities too numerous to mention. I am aware that the case of *Bar v. Oskaloosa*, 45 Iowa, 275, contains matter which seems to place the stamp of legitimacy upon this method of taking both public and private property, by indirection and without compensation, for the private use of another, but the authority of that precedent has often been questioned, and of late has been regarded as overruled. See *Long v. Wilson*, 119 Iowa, 267; *Ridgeway v. Osceola*, 139 Iowa, 590, and cases there cited. The subject I have here touched upon is one of great public consequence which sooner or later must have the serious attention of this court, but the time at my command will not permit its adequate discussion in the present case. For an interesting and learned discussion of the peculiar property right of abutting owners in the streets by which their lots are bounded even where the fee of such streets is in the public, see *Adams v. Railway Co.*, 39 Minn. 286 (39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644); *Story v. Railway Co.*, 90 N. Y. 122 (43 Am. Rep. 146); *Lahr v. Railway Co.*, 104 N. Y. 268 (10 N. E. 528).

In my judgment the judgment of the district court

should be reversed. I am authorized to say that Evans, C. J., unites in this dissent.

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G. H. RAGSDALE v. MARY A. TURNER, Appellant.

**Reformation of instruments: MUTUAL MISTAKE: EVIDENCE: RECOVERY OF PAYMENT.** Where the purchaser of property contracted to pay an agreed price therefor, by assuming a mortgage and paying taxes in stated amounts as part payment and the balance in cash, but after making the cash payment discovered that the mortgage and taxes amounted to more than the sum agreed upon, he was entitled to have the contract reformed on the ground of mutual mistake and to recover the overpayment on the taxes and mortgage, even though the contract was superseded by a deed to the property and an action at law for the overpayment might have been maintained, no objection to the form of the action having been made.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

SATURDAY, MARCH 13, 1909.

THIS is an action in equity asking the reformation of a real estate contract and the recovery of money alleged to have been overpaid for said property. There was a decree for the plaintiff, from which the defendant appeals.—*Affirmed.*

*Ryan & Ryan*, for appellant.

*Parsons & Parsons*, for appellee.

SHERWIN, J.—The defendant was the owner of the east two-thirds of lot 2, block 25, of the original town of Ft. Des Moines, and the plaintiff was negotiating the purchase of said property. The petition alleged that an oral

contract was entered into between the plaintiff and W. L. Ryan, attorney for the defendant, whereby the plaintiff agreed to pay \$16,000 for said property. Such payment was to be made by plaintiff assuming a mortgage on said property owned by the Equitable Life Insurance Company of Iowa and paying the 1906 taxes and the balance in cash. The deal had not been closed when the plaintiff was called away from home. Before leaving, however, he placed the matter in the hands of his son, with directions to him to close the deal if the defendant finally concluded to accept \$16,000 for the property; payment therefor to be made as hereinbefore stated. Mr. Ryan was also informed that the plaintiff was about to leave town, and was advised that he would make the necessary arrangements to close the purchase if the defendant consented to accept \$16,000 for the property during the plaintiff's absence. The defendant, through her attorney, Mr. Ryan, advised the plaintiff's son that she would accept \$16,000 for the property with payments in the manner indicated. Mr. Ryan and the plaintiff's son talked the matter over, and it was understood between them that \$16,000 was to be the purchase price of the property, that the plaintiff was to assume the payment of whatever was due on the mortgage to the Equitable Life Insurance Company, to pay the 1906 taxes, and the balance of the \$16,000 in cash. Mr. Ryan prepared a memorandum of said agreement, but it failed to include all thereof. It provided for the payment of the 1906 taxes, which were estimated at \$350, and the payment of \$15,650 in addition thereto; payment to be made as follows: "The said Ragsdale agrees to pay to the said Mary A. Turner the sum of \$5,650 in cash and agrees to pay one certain note and mortgage for \$10,000 running to the Equitable Life Insurance Company of Iowa." The deal was closed on the basis of this contract during the plaintiff's absence from home. When he returned he discovered that there was nearly a year's interest unpaid on

the mortgage in question, and that \$350, the amount which had been estimated as the tax for 1906, was too small by several dollars. This action followed a failure to adjust the matter.

There is nothing in this case but a question of fact, and it is not at all a serious one. In her answer the defendant admitted that she has made an oral contract with Ragsdale whereby she agreed to sell him the property for \$16,000. She also admitted that the taxes of 1906 were unpaid at the time she conveyed, and that she was to pay them. She also admitted that the mortgage to the insurance company was to be assumed by Ragsdale as a part of his payment of \$16,000 for the property. In addition to this admission in the pleading, the record conclusively shows that \$16,000 was the purchase price of the property agreed upon by the parties, that payment was to be made by Ragsdale assuming the mortgage in whatever sum might be due and paying the 1906 tax. It is further conclusively shown that he paid \$5,650 in cash to the defendant and paid over \$350 taxes. The cash payment and the taxes amounted to over \$6,000, and the face of the mortgage being \$10,000, and there being over \$10,000 due on it at the time the conveyance was made to Ragsdale, it is very apparent that Ragsdale did not get the property at the price agreed upon.

While the defendant strenuously insists that the evidence does not show mutual mistake in the written contract, we are unable to agree with such contention. One of two things is absolutely true: Either it was a mutual mistake on the part of young Ragsdale and Mr. Ryan, or there was gross fraud on the part of the latter, and, as fraud is not charged or intimated, it is very clear that there was mutual mistake.

The appellant says, however, that it is too late to correct a mutual mistake in the written contract, because it has been superseded by the deed, and the plaintiff's remedy,

if he has any, is based upon the deed itself. We do not agree with this proposition. While the action was brought in equity and asked for a reformation of the contract, we do not think such an action was necessary. The plaintiff might have sued at law to recover money paid through mistake without basing his action on the contract at all, and, if the defendant had then sought to defeat the action by proving the written contract, it would clearly have been competent for the plaintiff to show that such writing did not embody the true contract between the parties. No objection was made to the form of the action, and hence there was no error, however unnecessary it may have been to reform the contract. The vital proposition in the case is: Was the plaintiff entitled to recover the amount overpaid on the purchase price of the property? There is no question but what he was.

The judgment was therefore right, and it is *affirmed*.

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ARISPE MERCANTILE CO. v. QUEEN INSURANCE COMPANY  
OF AMERICA, Appellant.

**Insurance: VOIDABLE CONTRACT.** A policy of insurance issued by an  
1 agent covering the property of a corporation in which he is  
a stockholder, and also otherwise interested as the cashier and  
stockholder in a bank owning stock in the corporation, is voidable,  
unless notice of that fact is communicated to the insurance compa-  
ny and the objection is waived.

**Same: DUAL CAPACITY OF ISSUING AGENT: WAIVER.** Where a loss  
2 was adjusted by one having authority to transact all business  
incident to his employment, and having full knowledge that the  
agent who wrote the policy was financially interested in the cor-  
poration owning the insured property, but made no objection to  
payment of the loss on account of that fact, and the insured was  
put to trouble and expense in preparing and executing proofs  
of loss, the company was estopped from objecting to the issuing  
agent's dual capacity.

*Appeal from Union District Court.*—HON. H. M.  
TOWNER, Judge.

SATURDAY, MARCH 13, 1909.

ACTION for loss under insurance policy resulted in a judgment as prayed. The defendant appeals.—*Affirmed.*

*Temple & Temple*, for appellant.

*Sullivan & Sullivan*, for appellee.

LADD, J.—A policy of insurance, covering the stock of merchandise owned by the plaintiff, was issued January 9, 1905, by D. W. Stevenson as recording agent of defendant. Stevenson was cashier and stockholder of a bank which held some stock in the plaintiff company, and also was a director and the treasurer of said company. These facts were set up by way of defense, and that they were sufficient, in the absence of waiver or estoppel, appears from *Arispe Mercantile Co. v. Capital Insurance Company*, 133 Iowa, 272.

The reply pleaded a waiver and ratification in that defendant's adjuster, with full knowledge of the facts, put plaintiff to the trouble and expense of furnishing proofs of loss. D. J. Carpenter was defendant's adjuster for the territory, including Arispe, but, owing to sickness, he invited A. A. Clark, who was agent of the Phoenix Insurance Company of Brooklyn, to adjust the loss in his stead, and the latter, in connection with J. F. Rice, representing the Des Moines Fire Insurance Company, went to Arispe on February 1, 1905, and there investigated the loss. What occurred then is somewhat in dispute. Stevenson testified that, in response to an inquiry by Clark, he told the latter who the

1. INSURANCE:  
voidable  
contract.

2. SAME: dual  
capacity of  
issuing agent:  
waiver.

officers and agents of the plaintiff company were, that he (Stevenson) was treasurer and one of its directors, and that the bank of which Clark knew he was cashier also owned stock in the company. This evidence was corroborated by two other witnesses, but denied in part by Clark. With the assistance of Phillips, plaintiff's bookkeeper, Clark examined the books, and also the bills ascertaining the value of the goods destroyed. The entire day was given to this by plaintiff's officers, as its evidence tended to show, subsequent to imparting the above information. Upon computation and apportionment among the several companies it was found that defendant's portion of loss was \$1,729.79. Clark prepared proofs of loss, and required these to be signed by plaintiff's officers, and the company itself through its president, who swore to it. He also prepared a schedule containing the data in detail, with computation and a statement of the amount allowed as that above stated. The proofs, with this schedule, were transmitted to the company's office in Chicago, where it was received February 6th. According to the witnesses for the plaintiff, Clark advised them that the company would avail itself of the sixty days allowed within which to pay the loss. In a letter to Stevenson as treasurer of the company, dated February 27th, the insurance company wrote that: "As we previously advised you we referred the matter of prepayment of the claim to special agent Carter, and he advised us, after conferring with other adjusters. that with the exception of the Des Moines Insurance Company, the companies all agreed to pay the loss at maturity; we therefore do not care to send draft in advance of that time." It thus appears that the jury might have found that the adjuster, after being fully advised of the relationship of Stevenson to the plaintiff company, proceeded with the examination of its books and bills, exacted their production and the assistance of the officers in ascertaining their contents, and required the execution of the proofs of



loss. As adjuster of the loss for defendant, Clark was endowed "with authority to transact all business within the scope of his employment" (section 1750, Code); and, as such adjuster might waive any condition affecting the validity of the policy (*Acid Manufacturing Company v. Insurance Company*, 126 Iowa, 226), the policy was not void because of Stevenson's dual relationship to the parties. It was voidable only, and subject to ratification by the company or to repudiation precisely as though voidable because of some breach of condition. The insurer was charged with the knowledge acquired by the adjuster; and if, after ascertaining the facts, it proceeded as though the policy were valid, and through such adjuster induced the plaintiff to go to trouble and expense, in the production of its books and bills, to expend time in aiding the investigation, and to furnish proofs of loss, it ought not thereafter be permitted to set up the invalidity of the policy. The only ground upon which it could have made the requirements mentioned was its obligation to perform as stipulated in the contract; and, having induced plaintiff to act to its disadvantage in reliance thereon, it was estopped from thereafter changing its position to the plaintiff's prejudice. These propositions are too well settled to require the citation of authority.—*Affirmed*.

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GEORGE E. DEE, Appellant, v. SEARS-NATTINGER AUTOMOBILE COMPANY, PAUL V. PATTI and C. P. MILLER, Interveners.

**Raffing:** TRANSFER OF TITLE: LEGALITY: ESTOPPEL. Where the owner of an automobile disposed of the same by means of a raffle and made no attempt to rescind, but gave the successful party an order for the machine on those in actual possession of the same, there was an effectual transfer of title as between the owner and such successful party; and the parties in possession were in no position to question the legality of plaintiff's title, because ac-

quired through a raffle, especially after recognizing the order and agreeing to hold the same for the transferee.

**Replevin: PLEADING: EVIDENCE.** In an action for the recovery of 2 personalty where the issue is simply as to whether defendant agreed to hold the property as plaintiff's bailee, the plaintiff may prove without pleading the fact that a stipulation in the receipt given for the property is not binding upon him, because inserted without his knowledge and contrary to the oral agreement.

*Appeal from Polk District Court.*—HON. JESSE A.  
MILLER, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

ACTION to recover possession of an automobile, claimed by plaintiff as owner and alleged to be in the possession of the defendant as bailee. The defendant alleged that the ownership of the machine was jointly in plaintiff and the two interveners, under a written agreement that it should be held for them, and only delivered on a written order signed by all three of them, and that no such order had been presented to defendant by the plaintiff. At the conclusion of the evidence offered for plaintiff the court directed a verdict for the defendant, and plaintiff appeals.  
—*Reversed.*

*Ira W. Anderson and J. K. Macomber, for appellant.*

*Mills & Perry, for appellees.*

MCCLAINE, J.—There is testimony in the record tending to show that the automobile in question was put up by the owner, one Van Werden, at a raffle; that plaintiff was the holder of tickets in this raffle; that at the conclusion of the drawing Van Werden gave to plaintiff an order on defendant in whose possession the machine had been dur-

ing the time the tickets were being sold and the raffle conducted, advising defendant as follows: "Mr. Dee has drawn the automobile, so you can deliver it to him as I telephoned you;" that plaintiff presented this order to defendant, and asked that defendant recognize the order and keep the machine on storage for plaintiff; that an officer of the defendant took and retained this order, and proposed to give to plaintiff a receipt for the machine; that the instrument, purporting to be a receipt, but containing a stipulation that the machine should be held as the joint property of plaintiff and interveners, and only delivered on their joint order, was delivered to plaintiff, who, believing the instrument to be a simple receipt to him from defendant for the machine, accepted and retained it without knowledge of its contents, he being unable to read the instrument on account of defective sight, and being assured that it was such receipt as he had requested; and that subsequently, on demand by the plaintiff for the possession of the machine, with tender of the storage charges, defendant refused to deliver the machine to plaintiff. In their arguments counsel have discussed many questions which we think are not involved in determining the correctness of the court's holding that there was no evidence to sustain plaintiff's right of recovery. From a finding made of record by the trial judge it appears that under the evidence he considered plaintiff's title to be so affected with the illegal nature of the transaction as that he could not recover, and this is the only view of the case which we think it necessary to discuss.

There is nothing in the record to indicate that defendant was a stakeholder of the machine. The fact that a part of the proceedings connected with the drawing took place in the defendant's garage is wholly immaterial with reference to this question. Defendant was not to determine the result of the drawing. That was left to other

1. RAFFLING:  
transfer of  
title: legality:  
estoppel.

persons for decision, and, so far as this record shows, was decided by Van Werden himself. Up to the time the drawing was decided Van Werden had the entire ownership and constructive possession of the machine. He then recognized plaintiff as entitled to possession, and did not attempt to rescind on account of illegality in the transaction, nor object to the delivery of the machine to plaintiff. If defendant had delivered actual possession of the machine to plaintiff on this order, and plaintiff had taken the machine away, neither defendant nor Van Werden, nor any other party to the illegal transaction, could have questioned plaintiff's right on the ground of illegality. After property has been delivered to the successful party in consequence of a bet or wager it is too late for another party to the transaction to attempt rescission or raise the question of illegality. *Trenery v. Goudie*, 106 Iowa, 693; *Okerson v. Crittenden*, 62 Iowa, 297; *Thrift v. Redman*, 13 Iowa, 25; *Himmelman v. Pecaut*, 133 Iowa, 503. Defendant, as Van Werden's bailee, had nothing to do with the legality of the transfer of title from Van Werden to plaintiff; but, in any event, if defendant recognized plaintiff as the owner of the machine by accepting Van Werden's order and agreeing to hold the machine for plaintiff, it was then too late to go into the legality of the transaction between Van Werden and plaintiff. It is to be borne in mind that defendant is not now claiming to hold the machine for Van Werden, but insists that it has become bailee, not for plaintiff, but for plaintiff and interveners as joint owners. The question as to the validity of the transfer of title from Van Werden to plaintiff as the result of a lottery scheme is finally disposed of, so far as this case is concerned, by the evidence showing that, as between Van Werden and plaintiff, the transfer of title has been completed and the title of Van Werden effectually extinguished.

When plaintiff proposed to testify as a witness that defendant accepted the Van Werden order and assented to

hold the machine as bailee for plaintiff, the court ruled that such oral testimony was inadmissible, for the reason that plaintiff admitted the receipt of some instrument in writing delivered to him by or in behalf of the defendant. This instrument, already referred to, had not been received in evidence except for purposes of identification, and we think that, until it was shown that the obligations of defendant as bailee were evidenced in writing, it was not proper to exclude plaintiff's testimony as to a parol acceptance. But however this may be, a more important consideration is that a receipt in writing does not exclude parol evidence of the fact of such receipt. It is said for appellee that the instrument was more than a receipt; that it contained a stipulation in the nature of a contract. But plaintiff was proposing to prove that the stipulation in the instrument was not binding upon him. Evidence to this effect for plaintiff was admissible without any pleading, for the issue was simply whether defendant had agreed to hold the machine as plaintiff's bailee. The court erred, therefore, in excluding evidence offered for plaintiff that defendant orally agreed to keep the machine as plaintiff's bailee, and further erred in directing a verdict for defendant on the record; for there was enough in plaintiff's evidence to show that the title of the machine had passed to him, in the absence of any proof to the contrary. While something had been said in the course of the trial with reference to the receipt as proving joint ownership in interveners with plaintiff, no competent evidence of that fact had been introduced when plaintiff rested his case and a verdict for defendant was directed.

The judgment is therefore *reversed*.

2. REPLEVIN:  
pleading:  
evidence.

MARY JONES, Administratrix of the Estate of M. F.  
JONES, Appellant, v. O. P. HERRICK, Appellee.

141 615  
144 7

**Master and servant: NEGLIGENCE OF MASTER: EVIDENCE.** In an action  
1 for the death of an employee resulting from injuries received  
from the breaking of the hoist chain of a grader, the evidence  
is held sufficient to support a finding that defendant was negligent  
in using the defective chain.

**Same: NEGLIGENCE: SAFE PLACE TO WORK: CONTRIBUTORY NEGLIGENCE.**  
2 An employee assisting in the operation of a grader, when re-  
quired to go beneath the machinery to aid in starting the belt  
by which it was operated, had the right to assume that it was  
so constructed that it was a reasonably safe place in which to  
work, in the absence of any knowledge or warning that the  
machinery was defective. In the instant case the circumstances  
are such that the issue of plaintiff's negligence should have been  
submitted to the jury.

**Same: SCOPE OF EMPLOYMENT: EVIDENCE.** Evidence that teamsters en-  
3 gaged in hauling dirt from a grader were requested by the person  
in charge of the machine to assist in starting the elevator by  
going underneath the same is held sufficient to warrant a find-  
ing that such was the custom, and that plaintiff in so doing was  
not a volunteer but in performance of a duty incident to his  
employment.

**Same: CUSTOM: EVIDENCE.** While a custom can not be established  
4 by proof of a single act or transaction, still it may be shown  
by the testimony of a single witness. In the instant case, how-  
ever, the evidence was not of a custom, but of the fact that in  
operating a grader it was customary for the employees to assist  
in starting the elevator when clogged by going underneath the  
same, and was competent for the purpose of showing that plain-  
tiff in so doing was acting within the line of his duty.

*Appeal from Franklin District Court.*—HON. R. M.  
WRIGHT, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

ACTION for damages resulting in a verdict directed for defendant and judgment entered thereon. The plaintiff appeals.—*Reversed.*

*John M. Hemingway*, for appellant.

*J. K. Macomber*, for appellee.

LADD, C. J.—I. The plaintiff is administratrix of the estate of her deceased husband, who, on August 14, 1906, was killed by the falling of an elevator attached to a grader. This machine was moved by ten or twelve horses in front and six or eight horses behind. At the side, at right angles with the grader, was an elevator, or carrier, two or two and one-half feet wide and about nine feet long, hinged to the grader near the bottom, and supported by a chain on each side attached near the outer end. These chains passed back to the grader and in some way were connected with another which was fastened to a wheel, by turning which the end of the elevator was raised or lowered as might seem necessary. The earth was taken from the plow beneath the grader and carried on an apron or belt up the elevator to the end, where it was dropped into a wagon hauled along as the grader moved. Several men and teams were engaged in hauling the dirt so loaded to a dump about thirty rods distant, and among these was deceased. The grader was operated by three men, one of whom drove the teams in front, and another those behind, and the third, Meeker, who rode on the grader, managed the plow which threw up the dirt and the carrier which elevated it to the wagons, and he was in charge of the work generally. The earth frequently clogged the elevator, when it became necessary to clean it out with shov-

1. MASTER AND  
SERVANT:  
negligence  
of master:  
evidence.

els from above or to assist in starting it by tightening the apron. This was done by seizing the apron from beneath and pulling down when the grader started or was moving. On the occasion in controversy, Foster, who was employed to do anything required, noticed the elevator stop, and, as he went for a shovel, deceased leaped from his wagon, some twenty feet away, and went beneath the carrier as Foster returned to it, when Meeker, who was in charge of the work, called out, "Stand back boys! get away from there! Foster, get away!" or "Stand back, Foster! get away! stand back!" or "Stand back, boys! stand back, Foster!" and, as Foster moved back slightly, deceased pulled down on the apron, the chain broke, and the carrier fell on him, inflicting injuries owing to which he expired in a few minutes. The negligence charged is that an insufficient and defective chain was used to work the carrier. As this chain was but three-eighths of an inch in diameter, and the evidence tended to show it had been broken a short time previous, and that the link broken was half worn through, and also that it was at a place readily observable by Meeker, the jury might have found defendant to have been negligent in the respects charged.

II. And it can not be said as a matter of law that deceased, if in the line of his duty, was negligent. If required to go beneath the carrier in order to aid in starting the apron, the employees had the right to assume that the machinery was so constructed that the place was a reasonably safe place to work. Of course, if a chunk of earth were toppling from the end of the elevator, any one would know, as a witness testified, that it would be dangerous to go beneath it. So, too, if any one was aware that the chains were insecure. But there is nothing in the record before us indicating that deceased knew of or was put on inquiry concerning any defect in the machinery. The warning of Meeker was at the instant the ele-

2. SAME:  
negligence:  
safe place  
to work:  
contributory  
negligence.



vator fell and was not necessarily inconsistent with deceased continuing at what he was doing. Pulling down on the apron merely aided the machine when it started, or was going, to move the apron with its load of dirt. The grader was standing, and deceased might well have construed what Meeker said as warning the other men to stand aside, as he was about to start, and especially as he directed Foster, who was about to shovel the dirt out, to get away. In view of the circumstances, we are of opinion that the issue as to whether deceased by his own negligence contributed to his injury was for the jury.

III. But appellee contends that deceased was a mere volunteer and not engaged in the line of his employment. He was an employee, with two teams and wagons

3. SAME:  
scope of  
employment:  
evidence.

was engaged in hauling dirt from the elevator to the dump. The evidence was to the effect that Meeker frequently went beneath the elevator, when clogged, and pulled down on the apron so as to aid in starting it. There was no showing that the teamsters then engaged in hauling did this or were requested to. One Hinton testified that some time previous Meeker had requested him to assist in starting the elevator, but that he had refused because he could not leave his team. One Hanson, who drove one of the teams of deceased for about a month prior to the middle of July previous, though on the same grade about one and one-half miles from where the accident occurred, testified that, when the elevator clogged, the teamsters would go underneath it and pull down on the apron to start it, that Meeker had directed him to do so even when a wagon was not under the end, and that this was of frequent occurrence, though he was not employed to do this work, and that he had heard him call on other men to assist in starting the elevator. There was no showing of what deceased was employed to do, other than as stated. As the grader was being operated by the same person who

employed the teamsters, he might have required them to assist in managing the elevator as well as driving the teams. That they did so frequently at the instance of the person in charge of the work, even though some weeks previous to the accident, tended to show that this was the method employed in performing the work, and that in going beneath the elevator and pulling on the apron deceased and other teamsters were acting within the line of their employment. From such evidence the jury might have found that this was the customary method of doing the work, and therefore that deceased in what he did was not a volunteer, but in the performance of a duty exacted from teamsters when the elevator clogged.

IV. Appellee urges that the custom in doing the work can not be proven by a single witness. Of course, a single act or transaction is not enough to warrant the inference that such act or transaction is customary; but we know of no authority declaring the practice or method of performing labor may not be proven by one witness. True, there has been some controversy as to whether a local custom may be shown by a single witness, but the rule seems to have been settled by modern decisions that the testimony of one witness may be sufficient. *Southwest Va. M. & L. Co. v. Chase*, 95 Va. 50 (27 S. E. 826); *Robinson v. U. S.*, 13 Wall. 363 (20 L. Ed. 653); *Vail v. Rice*, 5 N. Y. 155; *Partridge v. Forsyth*, 29 Ala. 200; 3 Wigmore on Evidence, section 2053. But the testimony was not of a local custom, but of the particular method or system adopted by defendant in operating a grading outfit, and for that purpose it was competent (see 1 Wigmore, Evidence, section 379) and in connection with other evidence was sufficient to carry the issue as to whether deceased was engaged in his line of duty to the jury.—*Reversed*.

4. SAME:  
custom:  
evidence.

LULU KERN, Administratrix of the Estate of V. D. KERN,  
Deceased, Appellant, v. THE DES MOINES CITY RAIL-  
WAY Co., Appellee.

**Appeal: DIRECTION OF VERDICT: REVIEW.** Upon reviewing a directed  
1 verdict the appellate court will adopt that view of the case  
most favorable to the unsuccessful party; and where from the  
whole evidence reasonable minds may differ as to the weight  
of the evidence, or inferences to be drawn therefrom, the con-  
clusions will be held to be for the jury, and for the purposes of  
the appeal will be resolved in favor of the unsuccessful party.

**Street railways: COLLISION: NEGLIGENCE.** The fact that a street car  
2 was being operated at an unlawful rate of speed at the time of  
injury to a pedestrian from collision is enough to take the issue  
of negligence to the jury.

**Opinion evidence: SPEED OF CARS.** A witness who has shown some  
3 knowledge as to the speed of a street car may testify on the sub-  
ject, although not an expert.

**Evidence: *res gestae*.** Statements of the motorman of a street car  
4 regarding an accident and made immediately thereafter are ad-  
missible as part of the *res gestae*, regardless of the purpose in  
offering the same; and an erroneous ruling in excluding the same  
will be presumed to have been prejudicial, unless, as is ordinarily  
required, the successful party shows otherwise.

**Evidence: DESCRIPTION OF INJURIES.** Where there was doubt as to  
5 how and where a deceased was struck by a street car and his  
position when he was struck, a physician should have been per-  
mitted to give the nature and a description of his injuries in  
aid of a solution of these questions, even though the accident and  
resulting death were admitted.

**Same.** Where the issues in an action for the death of one injured in  
6 a street car accident involved a liability under the doctrine of the  
last clear chance, and also the question of decedent's negligence,  
exclusion of the motorman's statements concerning and immedi-  
ately following the accident was erroneous, as well as refusal to  
permit the physician to describe the nature and character of the  
injuries; as the evidence might have had a bearing upon either or  
both such issues.

**Street car accident: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** Evidence  
7. held insufficient to show as a matter of law that deceased was  
guilty of contributory negligence in attempting to cross the street  
car track for the purpose of boarding an approaching car.

**Same: PRESUMPTION AS TO SPEED.** A pedestrian having observed the  
8 approach of a street car may rely on the presumption that it is  
not traveling at a greater rate of speed than is permitted by the  
city ordinance.

**Same: NEGLIGENCE: ESTOPPEL.** A street car company can not, through  
9 a violation of rules made for the benefit of the public, place one  
rightfully on the street in a perilous position and then to avoid  
liability for injury to him while in that position be heard to say  
that he did not use ordinary prudence for his own safety

**Same: CONTRIBUTORY NEGLIGENCE.** A pedestrian who has observed  
10 the approach of a street car is not as a matter of law bound  
to look a second time, but having located the same he may rely  
on the assumption that it will be run at the usual speed.

**Same.** Where a street car company negligently throws a pedestrian  
11 off his guard and puts him in peril, his conduct while in that  
situation will not under any circumstances be regarded as con-  
tributing to his injury.

*Appeal from Polk District Court.*—HON. JESSE A.  
MILLER, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

ACTION at law to recover damages for the death of  
V. D. Kern, due, as is alleged, to defendant's negligence  
in operating its street cars on one of the streets in the  
city of Des Moines. At the conclusion of plaintiff's evi-  
dence the trial court on motion directed a verdict for the  
defendant, and plaintiff appeals.—*Reversed.*

*Gillespie & Bannister* and *Thos. A. Cheshire*, for  
appellant.

*N. T. Guernsey and Parker, Hewitt & Wright, for appellee.*

DEEMER, J.—As there was a directed verdict for defendant at the close of plaintiff's testimony, we must take that view of the case most favorable to plaintiff which the evidence tends to disclose, without, of course, indicating that this is the one which should obtain upon trial by jury. All reasonable and legitimate inferences which the testimony will bear must be resolved in favor of the plaintiff; and, if on the whole case reasonable minds might differ regarding the weight of the testimony or the inferences to be drawn therefrom, the conclusions are for a jury, unless, giving to the testimony its most favorable aspect, no other conclusion may fairly be drawn save the one arrived at by the trial court. We may say at the outset that we are favored with a copy of the opinion of the trial court, announced when passing on the motion to direct, from which it appears that the motion was sustained on the ground that plaintiff's intestate had not shown himself free from contributory negligence. This much for the reason that with this thought in mind the case may be better understood as we proceed.

V. D. Kern was an insurance agent, living at 1334 East Walnut Street in the city of Des Moines. He was at the time of his death 32 years of age, and had a wife and children dependent upon him. He had been troubled with rheumatism, but it is claimed had recovered before the accident in question. Grand Avenue in the city of Des Moines is one of the principal streets in that city, running from its western limits eastward past the State Capitol to the State Fair Grounds. For a part of the way on the east side of the Des Moines River the defendant, an electric street railway company, occupied this street with its tracks—the tracks being double from Twelfth to Four-

teenth Streets on that side of the river. At the crossing of Grand Avenue with East Thirteenth Street the rails of these tracks are four feet and eight inches apart, and the south rail of the north track is four feet and four inches distant from the north rail of the south track. It was Kern's custom to take defendant's street car in going to and returning from his home, and he almost universally took the car at the junction of Thirteenth Street with Grand Avenue. It was the habit and custom of the street car company to stop its cars for the ingress and egress of passengers at the far side of the crossing; that is to say, it passed over the street intersections with its cars before stopping to receive or discharge passengers. There is an ordinance of the city forbidding a greater speed of street cars than eight miles per hour in the business district and than twelve miles per hour in the residential section. The junction of Thirteenth Street and Grand Avenue and all other places in the immediate vicinity are in residential sections. The annual state fair was in progress on the grounds of the society at the east end of Grand Avenue during the last week of August of the year 1906, and the street cars were generally heavily loaded, and ran at frequent intervals over the tracks of the defendant company on East Grand Avenue. The cars and trains ran both east and west over and upon the double tracks above described, the west-bound cars taking the north and the east-bound cars the south tracks. East Walnut, where Kern lived, is south of Grand Avenue, and to take the west-bound cars he went north on Thirteenth to Grand, crossed over the south track to the north one, and to take the car was obliged to go to the northwest corner of the street intersection where the cars were stopped. East Twelfth Street is approximately three hundred and seventy-five feet west of East Thirteenth, and East Fourteenth is about seven hundred feet east of East Thirteenth. The grade is downward from Twelfth to Thirteenth, and for

some distance eastward, from Twelfth to Thirteenth being 1.22 per cent. At or about two o'clock in the afternoon Kern started from his home with the declared purpose of visiting his father, who lived on the west side of the river. He went from his home north on the east side of Thirteenth street, came to Grand avenue, and there it is claimed saw one of defendant's trains slowly coming from the east, made up of the usual car and a trailer, close to the intersection of Grand avenue with Thirteenth street. At the time that Kern reached the southeast corner of the intersection of these streets there was an eastbound car at the junction of Twelfth street with Grand, three hundred and seventy-five feet to the westward from Grand and Thirteenth. A west-bound car had passed just before Kern came to Grand avenue, and it is evident from the entire record that Kern was intending to take the westbound train, which was then nearing the street intersection when he reached the junction of Thirteenth and Grand. He had started from home with the intention of going to the west side of the city, had gone to the place where he usually took the street cars, and was observed passing from the junction of Thirteenth and Grand at the southeast corner, northward and a little west toward the northwest corner of these street intersections. As he approached the tracks, the west-bound train, instead of passing over the street intersection and stopping at the far side thereof, stopped in the middle of the street intersection for some purpose, and Kern was prevented from getting across to the north side of the north track to take the car, which he was evidently intending to board. Just here we find the most serious dispute in the case. On the one hand, it is contended that there is no proof that Kern intended to take the west-bound car, and no testimony that he saw this car, which was now very close to the street intersection. It is also contended, on the behalf of the railway company, that the west-bound car was stopped

because Kern was either upon the track or close to it and to avoid striking him. We have set forth enough of the record to show that a jury was justified in finding that Kern was intending to take this train, and had started across Grand Avenue for that purpose. Whether or not he saw the west-bound train which he was intending to take as he came to the street intersection was a question for a jury, under all the circumstances disclosed, which in part consisted of some testimony that deceased looked in the direction of that train as he left the curb to cross the street.

There was also testimony from which a jury might have found that the west-bound train was stopped at an unusual place because it had carried by some passengers who wished to alight at Fourteenth Street east, and desired to have them get off as soon as possible. As these were jury questions, we must assume, for the purposes of this appeal, that they would have been resolved in favor of plaintiff. We have, then this west-bound car stopping before crossing the street intersection of Thirteenth Street, and directly in front of deceased as he was pursuing his way toward the northwest corner of the street intersection. Before stopping, the bell was rung for the crossing, and considerable noise attended the act of slowing down. A jury was authorized to find that, immediately upon the stopping of the west-bound train in the path which deceased was pursuing, he started eastward to go around the latter, and that while passing along the side of the trailer, he was struck by the east-bound car which he had seen at Twelfth Street as he had started to cross Grand Avenue to take the west-bound train. This east-bound car was running at a speed of from fifteen to twenty-five miles an hour, and a jury may have found that it was running at even a greater rate than the highest here named, and that no bell or gong was sounded until just as the car reached and ran over plaintiff's intestate.



The car was going so fast that it ran from one hundred and twenty-five to one hundred and fifty feet after it struck Kern before it was brought to a stop. There is no direct testimony that the motorman on the east-bound car saw deceased until just as it struck him; but, as no signal was given until immediately before the collision, a jury may have concluded that he did not see Kern until just as the car was about to strike him. When Kern was struck, or just immediately before that time, the west-bound train was standing, discharging passengers; but the motorman on the east-bound car paid no attention, contrary to the custom of motormen, to the fact that he was approaching a standing train from which passengers were being discharged, and did not slow down or place his car under control as he came to the standing car. All agree that Kern was struck by the rapidly moving east-bound car, and that he was run over, receiving injuries from which he died on August 31, 1906.

Little or nothing is said regarding the sufficiency of the testimony to justify a finding of negligence on the part of the defendant's employees in the operation of the two cars or trains of which we have been speaking. It is practically conceded that there is enough testimony to support many of the specifications of negligence; and, if there were nothing more in the case than the unlawful speed of the east-bound car, this would be sufficient to take the case to a jury on the issue of defendant's negligence. Passing that point, we have the question of plaintiff's contributory negligence, or rather his freedom from such negligence, and certain rulings made by the trial court on the rejection of testimony.

Before going to the main issue on which the case was determined by the trial court we shall dispose of some of the rulings on testimony. Certain witnesses, nonexpert, it is true, but who showed some qualifications to speak

2. STREET  
RAILWAYS:  
collision:  
negligence.

upon the subject, were asked to state how fast the east-bound car was going. On defendant's objection this testimony was excluded. It should have been received. *Van Horn v. Railroad*, 59 Iowa, 33; *Pence v. Railroad*, 79 Iowa, 389; *Cronk v. Railroad*, 123 Iowa, 349; *Gregory v. R. R. Co.*, 126 Iowa, 232.

A witness named Jackley, who was riding on the east-bound car, alighted as soon as it was stopped after it had struck Kern, went to where Kern was lying, there met the motorman of the east-bound car, and immediately had a conversation with him as to how the accident occurred. Questions calling for statements of the motorman in this connection were objected to, and the objections were sustained. They should have been overruled. These declarations were clearly part of the *res gestae*, and they should have been admitted as a part of the transaction. *Alsever v. Railroad*, 115 Iowa, 338; *Fish v. Railroad*, 96 Iowa, 702; *Christopherson v. Railroad*, 135 Iowa, 409; *Hynoven v. Iron Co.*, 103 Minn. 331 (115 N. W. 167). The only argument made in support of the ruling is that, although erroneous, it was without prejudice, because there is nothing showing what plaintiff expected to prove by the witness. This proposition, while ingenious, is without merit. The testimony was, as we have said, a part of the transaction, and a material part thereof. Plaintiff was entitled to show it all, and was not bound to disclose her purpose in so doing. Being a part of the transaction itself, it was manifestly material, and its rejection was presumptively prejudicial. It was not a collateral matter, the materiality and competency of which did not appear, but a part of the "thing done," to which plaintiff was entitled. An erroneous ruling under our practice is presumed to be prejudicial, and ordinarily it is for the successful party to show that it was without prejudice.

A doctor, who examined Kern and treated him after he was hurt, was asked to describe the nature of his wounds in ordinary language so that a jury could understand it. Objection to this was sustained on the ground that, as the injury and death were admitted by defendant, there was no necessity for going into this matter. There was some doubt about just how and where Kern was struck, and some question as to his exact position when struck. An examination of his wounds and a description thereof would certainly help to solve these problems, and the question should have been answered. There was no testimony in the case, either expert or nonexpert regarding the nature of the wounds inflicted upon Kern's body. Here again prejudice will be presumed. For defendant it is strenuously contended with reference to all of these rulings that, whilst some of them may have been erroneous, they were without prejudice, for in any event the court was right in directing a verdict, because plaintiff had not shown that her intestate was free from negligence contributory to his injury.

It is also argued that, even had the rulings been the other way, the answers would have had no bearing upon the question of Kern's contributory negligence. We can not agree to this contention. True the tes-

5. EVIDENCE:  
description  
of injuries.

6. SAME.

timony as to the speed of the east-bound car may, for the purposes of our present inquiry, be said to have been cumulative, and to have no bearing upon Kern's conduct just preceding the accident. But testimony as to the statements of the motorman immediately after the accident occurred might have had a very material bearing upon the question of Kern's conduct before he was struck by the car. It might have been sufficient in itself to take the case to a jury upon an issue presented by the pleadings, wherein defendant is sought to be held liable under the doctrine known as "the last fair chance." More-

over this declaration of the motorman might have shown such conduct on the part of Kern as to negative the thought of negligence on his part. Again the testimony as to the nature of Kern's injuries might have had some bearing upon the question as to how, when and where he was struck. There is a suggestion in the argument for appellee that Kern was caught between the two cars, or that he was struck by the east-bound car just as he jumped from in front of the west-bound to avoid injury to himself. The case must be reversed because of these erroneous rulings, but as defendant insists that plaintiff's intestate, under the showing made, was guilty of contributory negligence as a matter of law, and that there should be no recovery in any event, we shall give some attention to that matter.

The trial court's affirmative finding upon this question was bottomed on the thought that Kern did not see the west-bound car until just as he was about to cross the track ahead of it, was not looking out for it, but on the contrary was moving across Grand Avenue without paying any attention to the west-bound car, and that, with no other thought than of the east-bound one, he voluntarily placed himself in a position of danger, either from one car or the other, or from both, and that he can not recover. This conclusion is based upon what we find to be a misconception of the record. There is as direct testimony as can be produced that defendant saw the west-bound car just after he stepped off the curb on the south side of Grand Avenue, and there is also testimony from which a jury would be justified in inferring that he saw it, and was endeavoring to cross to the northwest corner of the street intersection in order that he might board the same. His declared intent, his conduct in going to this place, and his actions after he arrived there, down to the time the west-bound car was stopped, were such as to justify the infer-

7. STREET CAR  
ACCIDENT:  
contributory  
negligence:  
evidence.

ence that he saw the car or train, and expected to pass behind the trailer and to board the train at the usual stopping place. Instead of stopping at the usual place, it was brought to a standstill directly in front of him, and just before it stopped the bell was rung, and other noises incident to stopping were made. When this train was stopped Kern turned toward the east to go around behind it, and while in that position was struck by the east-bound car. As the facts upon which the trial court's conclusion was based are not in accord with the record, the conclusion itself is unsound. We are constrained to hold, under the record before us, that Kern saw the west-bound car as he came to Grand Avenue, and that a jury may have found that he was crossing the street to get to the usual stopping place, expecting that the train would pass on ahead of him, and get to its customary place for receiving passengers without any danger to him from either the east or west bound cars or trains. But it is argued by counsel that plaintiff's intestate voluntarily placed himself in front of the east-bound car without taking any of the usual and ordinary precautions, and without any reasonable excuse, and for this reason that no recovery may rightfully be had.

It must not be forgotten in this connection that a jury would have been justified in finding that, when deceased started from the curb to go to the northwest corner of the street intersection he saw the east-bound car three hundred and seventy-five feet away and the west-bound train just a little east of the street intersection. He was justified in believing that the east-bound car would not come at a greater rate of speed than twelve miles per hour, and to act upon that assumption, so that a jury might have found that, had the two cars or trains been operated in the usual lawful and customary way, plaintiff might have passed to the northwest corner of the street intersection behind the west-bound

8. SAME:  
presumption  
as to speed.

train and in front of the east-bound one without any danger to himself.

It might also have found that the noise and stoppage of the west-bound train at an unusual place and manner, cutting off Kern's line of travel, so disconcerted and confused him that he did not think of the east-

9. SAME:  
negligence:  
estoppel.

bound one, and was by defendant's own conduct placed in such a hazardous and peculiar position as that his failure to get back off the south track or to look again for the east-bound car was excusable. A street car company can not, through its own failure to comply with its rules and customs, made for the benefit of the public, place one who is rightfully upon a street in a hazardous position, and then say that in extricating himself therefrom he did not act with that prudence which one would use under ordinary circumstances. If it created the peril, it can not be heard to say, "Well, you do not act discreetly in avoiding it." The law takes account of the impulses of humanity when placed in dangerous and hazardous positions, and does not expect thoughtful care from the persons whose lives are thus endangered.

Moreover, it can not be said, as a matter of law, that deceased was bound to look a second time for the east-bound car, even if he was blocked by the west-bound one. He had a right to assume, after hav-

10. SAME:  
contributory  
negligence.

ing located it but a few moments before, that it would not be rushed down upon him at an unusual and dangerous rate of speed. Indeed he had the right to believe it would come no faster than the ordinance permitted. A jury might have found that had the car not been run at an unlawful and unusual rate of speed, Kern could have passed around the west-bound train and out of danger before the east-bound one would have reached him, even after he knew that he had been blocked by the west-bound train. If the case had been submitted to a jury under the record before us, and it had found

for plaintiff, we would not have been justified in disturbing it on account of contributory negligence. The principles we have been discussing and the conclusions reached are so well supported by many of our opinions which have recently been filed that we need do no more than refer to them without making quotations from the language used. We call special attention to the following as being closely in point: *Perjue v. Gas Co.*, 131 Iowa, 710; *Ward v. Light & Power Co.*, 132 Iowa, 578; *Hart v. Railroad*, 109 Iowa, 631; *Doherty v. R. R. Co.*, 137 Iowa, 358.

We need not cite cases in support of the principle that where one places another in a position of peril, he has no right to expect circumspect conduct. In such cir-

cumstances it is for a jury to say whether  
 11. SAME.

or not the other party acted with that thought and prescience that one placed in a dangerous position was likely to adopt, and whether under all the circumstances he was negligent. Indeed the better rule here is that, if a defendant by his own negligent acts throws one off his guard or puts him in peril, the conduct of the person placed in the perilous position will not be regarded as contributory negligence under any circumstances. See *Beach on Contributory Negligence*, sections 67, 68, and cases cited.

We reach the conclusion that for the errors pointed out the judgment must be, and it is, *reversed*.

141	632
142	63

KIMBALL BROTHERS COMPANY, Appellee, v. CITIZENS GAS & ELECTRIC COMPANY, Appellant.

**Corporations:** CONTRACT BY AGENT: PROOF OF AUTHORITY. Where a company undertakes to perform a contract made by its managing officer, thus ratifying the contract to that extent, no showing of previous authority of the officer to make the contract is necessary to bind the company.

**Agency: EVIDENCE.** A witness who has observed the manager of a company in the actual transaction of its business may testify to the fact of his agency.

**Same.** Recognition of a contract made by an agent is sufficient proof of his agency and authority to make the contract.

**Breach of contract: EVIDENCE: RESULT OF EXPERIMENT.** In a damage action for failure to furnish electrical power as agreed to operate plaintiff's elevator, in which the plaintiff claimed that the trouble was with plaintiff's motor to which the power was applied, the court in its discretion properly admitted evidence of the result of a test of the motor, shown to have been made under practically the same conditions as when installed in plaintiff's plant.

**Same: EVIDENCE.** Under defendant's claim, in an action for failure to furnish electrical power as agreed, that plaintiff, knowing defendant's system, furnished a motor which was not adapted to its current and it appearing that the motor had been tested, the testimony of an electrical engineer as to the inadaptability of the system to the motor furnished was admissible.

**Instructions: LAW OF THE CASE.** The instructions given upon a trial are the law of the case and the jury is bound to follow them whether right or wrong.

**Breach of Contract: EVIDENCE.** In the instant breach of contract case the evidence is held sufficient to support a finding that defendant agreed to furnish a certain voltage of electricity for plaintiff's motor.

**Breach of contract: DAMAGES: RECOVERY.** The general rule is that a party who has suffered damage by reason of a breach of contract can recover only such damages as naturally arise from the breach, or such as may have been within the reasonable contemplation of the parties as the probable result of a breach; and it is the duty of the injured party to use reasonable diligence to minimize the damage, and he can not recover that which he might have avoided by the exercise of ordinary care and reasonable expense.

**Same: CONTRACT FOR ELECTRICAL POWER: BREACH: DAMAGES.** Defendant contracted to supply plaintiff with certain electrical power to operate its elevator but was unable to do so because its current was not adapted to plaintiff's motor. Defendant for about a year attempted to overcome the difficulty but failed and abandoned further efforts, and thereafter for the space of two years plaintiff accepted and paid for such power as it could furnish, when it changed its system and was able to furnish the current contracted for. *Held*, that plaintiff was only entitled as damages to the difference between the rental value of its buildings with the



current as supplied and their rental value had the contracted current been supplied, up to the time defendant abandoned efforts to furnish the agreed current; and for a reasonable time thereafter in which to change the system so as to get the required power, together with the reasonable expense of making the change, and not the difference in rental value up to the time defendant changed its system.

*Appeal from Pottawattamie District Court.*—HON. O. D. WHEELER, Judge.

SATURDAY, DECEMBER 19, 1908.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

ACTION at law to recover damages of defendant for failure to furnish an agreed current of electricity for the purpose of operating an elevator in a building in the city of Council Bluffs owned by the Groneweg & Schoentgen Company. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

*Harl & Tinley*, for appellant.

*Clem F. Kimball*, for appellee.

DEEMER, J.—The Groneweg & Schoentgen Company, a corporation engaged in the wholesale grocery business at Council Bluffs, undertook the erection of a large four-story building for the conduct of its business, and it entered into a contract with plaintiff, another corporation, engaged in the manufacture and sale of elevators, to furnish and install a freight elevator in said building with a capacity of six thousand pounds. Electricity was to be the motive power of the elevator. After the plans were all made, a representative of each of said corporations went to the office of the defendant, another corporation engaged

in the business of furnishing light and power, and there met a man by the name of Frieichman, who it is claimed was defendant's manager, to know if defendant could furnish the necessary electrical current to run the motor which had been designed for the elevator. According to the testimony, this manager or agent stated that his company could furnish sufficient current, and had such an unlimited quantity of that kind of power that it could "burn up" the motor. Relying upon this statement, the Groneweg Company proceeded with its building, and plaintiff installed the elevator, equipping it with a fifteen horse power, three-phase electric motor made by the Westinghouse Manufacturing Company. The designs for the motor were furnished by plaintiff, and it was built according to these designs. After the elevator and motor were installed, connections were made by defendant with its wires and cables, and it was found that the electrical current supplied by it would not start the motor when the elevator was loaded. Frequent and various attempts were made to correct the defects, but these were unavailing, and it was found impossible to start the motor when the elevator was loaded. It was discovered, however, that if the motor could be started without a load, and a sufficient rate of speed acquired before attempt was made to lift the load, that it would then work to approximately full capacity; but it would not start with a capacity load upon the elevator. Defendant did not generate its own current. Such as it had for sale it acquired from the Omaha Electric Company, which had a plant on the west side of the Missouri River, at Omaha, Neb. The current from this plant was "stepped up" to about five thousand volts, sent across the river to a substation, and there stepped down to a voltage suitable for commercial use.

It seems that during the time material to our inquiry there were two systems whereby the electrical cur-

rent was converted into power for commercial use, one known as the "monocyclic" and the other the "three-phase." Each was three-phase in character, but the monocyclic was quite different from the true three-phase system, in that the monocyclic system was so arranged that the currents passing through the three wires attached to the motor were not of equal intensity or voltage, while in the regular three-phase system the currents were the same. By reason of this fact a true three-phase motor of large size could not be operated successfully with a monocyclic current coming from the connecting wires without the use of a clutch or some other mechanism which would allow the motor to get up full speed before the load was to be lifted. The defendant at the time it is claimed the contract was made was furnishing what was known as the "monocyclic current of electricity," and, having attached its wires to a motor designed for the true three-phase system, it was found that it could not start the motor when the elevator was loaded to capacity, and that without the use of a clutch or other device it could not furnish the amount of power required to successfully operate the elevator when fully loaded. Many attempts were made to correct the difficulty, but none were successful, and defendant did not succeed in making the elevator work until the plant in Omaha changed its entire plant from the monocyclic to the full three-phase system. After that change was made, there was no difficulty in making the motor and elevator work to full capacity. It is claimed that defendant undertook and agreed to furnish the Groneweg Company with an adequate and sufficient electrical current to run the elevator and motor hitherto described, that it failed and neglected to do so, and that the company was damaged by reason of this default in the sum of \$1,800, being the rental value of the building during the time the Groneweg Company was deprived of the use of the elevator. Plaintiff is the assignee of the Groneweg & Schoentgen

Company, and as such brings this action. That the exact issues may be understood, we here copy from the petition the following statement of the cause of action:

That defendant promised and agreed to and with the Groneweg & Schoentgen Company to furnish electrical power of a specified current and pressure of a nature and style known as the 'monocyclic alternating current,' with equal potential in the several conductors thereof; that said Groneweg & Schoentgen Company, relying upon said promise, contracted with plaintiff to furnish a fifteen horse power motor attached to and part of an elevator machine to be placed in the warehouse of said Groneweg & Schoentgen Company, and defendant did promise and agree to furnish for said electrical power a monocyclic alternating current of two hundred and thirty volts pressure in each leg of said system; that the defendant wired and led into said warehouse an electrical alternating current, and represented and claimed to said Groneweg & Schoentgen Company that said current from said wires so led to the premises was of a certain potential in each conductor and of sufficient quantity to the uses of certain elevator machinery; that Groneweg & Schoentgen Company purchased from plaintiff an elevator machine, being an induction electrical motor, an approved design adapted to run with a monocyclic alternating electrical current on equal pressure on each leg of said system, and having a specified voltage of two hundred and thirty volts; that the Groneweg & Schoentgen Company erected and built said warehouse, valuable only for use as a warehouse and necessary to have an elevator of a capacity of 6,000 pounds to move rapidly from one floor to another; that plaintiff furnished said elevator machinery and motor to operate the same, and furnished a motor of sufficient capacity and suitable for operating said machinery and adapted to the use of the current and electrical power designated by defendant and contracted for by Groneweg & Schoentgen Company; that defendant failed and neglected to perform its said contract with Groneweg & Schoentgen Company, and did lead and run wires into the said building and connected the same for the use of said motor and machinery, and did promise Groneweg & Schoentgen Company to furnish over said

wires an alternating current on a monocyclic system with a working pressure of two hundred and thirty volts and sufficient current to operate said motor; that defendant ran and connected their wires with said electrical system, knowing the kind and style of motor contracted for by Groneweg & Schoentgen Company, but that defendant willfully and wrongfully refused to furnish said wires and alternating current of monocyclic system having a pressure of two hundred and thirty volts on each leg thereof, and did fail, neglect and refuse to furnish sufficient current and voltage to run any kind of a motor then or since built, and did without any fault or negligence of Groneweg & Schoentgen Company fail to perform their contract, failed and neglected to furnish electricity for power as promised and agreed; that said contract was verbal; that defendant did furnish an alternating current from a monocyclic system, but that said current was less than two hundred and thirty volts under use, and insufficient to operate said motor to its capacity or a sufficient capacity to run said elevator machinery to its full capacity, and failed and neglected to furnish sufficient current in said system to operate said motor or any motor to its full capacity or the full capacity of said machinery, and that, by reason thereof, Groneweg & Schoentgen Company were greatly damaged and kept out of the use of said elevator to its full capacity and forced to transport and lift their goods by other and more expensive means, and deprived of the use of said warehouse, and lost the use of said elevator and warehouse in connection therewith to its full capacity, and that for a period of three months said current furnished by defendant wholly failed to operate said machinery, and said Groneweg & Schoentgen Company were compelled to install direct electric motor connections with the wires of the street car company at great expense and loss to them; that thereafter the defendant improved its apparatus, and did furnish an insufficient current to operate said motor to its full capacity, but sufficient to partially operate said machinery for about thirty months, by which said Groneweg & Schoentgen Company were greatly damaged.

Defendant in answer, in addition to a general denial, alleged that it was operating an electric light plant on

what was known as the "monocyclic three-phase system," and had been operating the same for many years; that both plaintiff and its assignee were familiar with the system, and knew it was being used by defendant; that notwithstanding this they equipped the elevator with a full three-phase system motor, instead of a monocyclic one, and that they attempted on their own motion to utilize a monocyclic current for the operation of a three-phase motor, which could not be successfully done, and that whatever damage was suffered was due to this and not to any fault of defendant. It denied any contract or agreement to make the three-phase motor work with the current it was furnishing, and alleged that the fault was due to the inadaptability of the motor to the current which it, defendant, undertook to furnish. It also averred that, had the motor been supplied with a clutch, it could have been made to work, and that the only difficulty experienced was in starting the same when the elevator was loaded to full capacity. It also alleged that the elevator was run with more or less of a load during all the time for which plaintiff is seeking damages, and that, after the change of its system, it was satisfactorily operated. Such were the issues made by the pleadings, and upon trial to a jury a verdict was returned for plaintiff in the sum of \$1,000. The appeal presents many questions for our consideration, but it is not necessary in view of our final conclusion to notice all of them.

I. Claim is made that there is not sufficient testimony to show the authority of Frieichman to make the contract alleged for and on behalf of the defendant. We think

there was enough testimony to take the case to the jury on this issue. It was shown that Frieichman was in charge of defendant's Council Bluffs office; that he was the local manager, and had control of the power and service furnished by defendant; and that, by reason of the alleged contract with the Groneweg Company, defendant undertook to furnish power

1. CORPORATIONS:  
contract by  
agent; proof  
of authority.

for the operation of the elevator. It was by reason of the contract with this manager that defendant undertook to furnish power, and, having to this extent ratified the contract, no showing of previous authority was necessary.

II. A witness was permitted to testify that Frieichman was defendant's manager, and that he signed letters and acted as such in the Council Bluffs office. There was no error here. In this State a witness who has shown some competency is allowed to state that another is an agent. *Gualt v. Sickles*, 85 Iowa, 266; *Heusinkveld v. Insurance Co.*, 106 Iowa, 229; *Fritz v. Chicago Co.*, 136 Iowa, 699.

Even were there no other testimony, defendant's recognition of the contract made by Frieichman, whatever it may have been, was sufficient proof of his agency and of his authority to make the contract. *Dowagiac Co. v. Watson*, 90 Minn. 100 (95 N. W. 885); *Geiser v. Yost*, 90 Minn. 47 (95 N. W. 584); *Bradford v. Smith*, 123 Iowa, 41.

III. During the time the parties were trying to make the motor work, it was detached from the building where it was placed, and taken to the power plant in Omaha, and there connected with wires from the Omaha station, and given what is known as the "brake test." This was done for the purpose of discovering whether or not there was any defect in the motor. This test disclosed that the motor was not at fault, and that, when a current of from two hundred to two hundred and thirty volts was supplied to each leg of the motor, it would do the work and furnish the necessary power. The results of this test were, over defendant's objections, given in evidence to the jury, and of this defendant complains. Bearing in mind the purpose for which this testimony was adduced, there was no error. Defendant was claiming that the trouble was with the motor, in that it was not adapted to the monocyclic current.

2. AGENCY:  
evidence.

3. SAME.

4. BREACH OF  
CONTRACT:  
evidence:  
result of  
experiment.

It was taken to the Omaha plant to see if the fault was with the motor, and it was connected up with the same current which defendant was furnishing on the Council Bluffs side. The voltage and amperage were the same which defendant claimed it was furnishing at the building for which it was designed, and the current was furnished by the same generator. The test was made to discover if there were any defects in the motor itself, and for this purpose we think the results thereof were admissible in evidence. The testimony shows that for all practical purposes the conditions were the same as when the motor was installed at Council Bluffs. It was within the discretion of the court to admit the results of this test. *Homan v. County*, 98 Iowa, 692; *Burg v. Railroad*, 90 Iowa, 106; *Nosler v. Railroad*, 73 Iowa, 268.

IV. Defendant sought to prove by an electrical engineer the difficulty of using a monocyclic system in connection with a regular three-phase motor to carry a load of six thousand pounds, and as to the general inadaptability of the monocyclic current to a three-phase motor; but plaintiff's objections to such testimony were sustained. In view of the issues tendered by the answer and of the claimed result of the test made in Omaha, we think this testimony should have been received.

V. The trial court gave the following among other instructions:

It is conceded that there are three legs in a monocyclic system. The plaintiff claims that the defendant company, through its manager in Council Bluffs, promised and agreed that it would furnish a current of two hundred and thirty volts in each of the three legs of its system, and the plaintiff must prove such promise and agreement substantially as alleged. It will not be sufficient upon this point if it merely appear that the defendant promised and agreed

5. SAME:  
evidence.

6. INSTRUCTIONS:  
law of  
the case.



that it would furnish a current of electricity. Nor will it be sufficient if it but appear that said manager represented that the defendant company had sufficient current to operate said motor, but it must appear that he promised and agreed to furnish a current of a voltage of two hundred and thirty volts in each of the three legs of the system. And, unless this is established by the greater weight of evidence, the plaintiff can not recover. Unless the contract alleged by plaintiff has been established by the greater weight of the evidence before you, the defendant was under obligation only to furnish such current as could be reasonably furnished by such monocyclic system, and, if you find that the damage, if any, occasioned to the Groneweg & Schoentgen Company, was because the current furnished by the defendant was not adapted to the motor which was installed in the building in question, this would not entitle plaintiff to a recovery, even though another kind of current under another system might have accomplished the purpose and caused said motor to operate. If you find from the evidence that the defendant did promise and agree, through its manager at Council Bluffs, to furnish a current of two hundred and thirty volts in each of the three legs of the system substantially as alleged in the petition, then you should proceed to a determination of the next question of fact submitted to you, but unless you do so find, then your verdict should be for the defendant without proceeding further.

These instructions, whether right or wrong, were the law of the case, and the jury was bound to follow them.

Appellant's counsel contend that thereunder there should have been a verdict for it, in that there was no testimony in support of the proposition that defendant expressly agreed to furnish a current of two hundred and thirty volts in each of the three legs of its system. Counsel overlook the testimony of one witness to the effect that defendant's manager represented that it had and could furnish voltage of two hundred and thirty throughout—in each leg. There was also some other testimony from which a jury may

7. BREACH OF  
CONTRACT:  
evidence.

have found that this was the agreement to be implied from what was in fact said. The instructions were very favorable to defendant, perhaps more so than it was entitled to; but, treating them as the law of the case, we think there was enough testimony to justify a finding for plaintiff thereunder.

VI. The instruction given by the trial court with reference to the measure of damages reads as follows:

If plaintiff is entitled to recover, the measure of his recovery will be the difference between what would have been the reasonable rental value of said warehouse had said electric current been supplied by the defendant according to the terms of said contract, and what its reasonable rental value was in the manner in which said electric current was in fact supplied by the defendant company, as far as shown by the evidence in this case. In computing such rental value, you should begin with the date on which said motor and elevator were fully installed and the power of the defendant turned on, and estimate the same from such date up to the time when the defendant company furnished the power provided for under the terms of said contract or sufficient power to operate said elevator to its rated capacity of 6,000 pounds. It is the duty of one who is damaged by the fault or neglect of another to use all reasonable means, within his power, to lessen the amount of his damage, and, if he have the means within his power and fail to use the same to thus lessen the damage, he can not recover for such damages as he could by such means have averted or lessened. And in this case, even though you may find that the defendant contracted to furnish a certain amount of power, and you find that it failed to comply with the terms of its contract, if you further find from the evidence that the Groneweg & Schoentgen Company, through its officers, had knowledge of some device which could have been installed at reasonable expense, and by which said elevator could have been operated with the power furnished by the defendant company, then it was the duty of the said Groneweg & Schoentgen Company to have installed such device, and if they had such knowledge and failed to install the same within

a reasonable time, after having learned of the failure of the defendant to furnish such power under the contract, then the plaintiff can not recover for such damages as were occasioned after such reasonable time had elapsed within which to install such devise. The amount of plaintiff's recovery can not exceed \$1,799; such being the amount claimed in the petition. The parties will be presumed to have had knowledge of such devices as were in general use at the time, and which were in such general use as that persons engaged in such business ought, in the exercise of ordinary prudence, to have known of. The Groneweg & Schoentgen Company would not be required to resort to experiments in obtaining and putting in use any device or devices to thus lessen any damages by reason of the defendant's failure to comply with its contract, but they would only be required to use such device or devices as were known to them to be practical or which ought to have been so known to them had they exercised ordinary prudence and foresight in endeavoring to ascertain thereof, and such device or devices as could have been installed at reasonable cost, and which would have enabled the elevator to be operated with the power thus furnished by the defendant company. There was some evidence tending to show that the said Groneweg & Schoentgen Company installed a  $7\frac{1}{2}$  horse power direct-current motor, and for some time operated the elevator to some extent. The said Groneweg & Schoentgen Company, it appears, adopted this means to enable them to operate the said elevator during a time when the motor in question failed to operate it, and they had a right to do so to lessen the damages which might be occasioned by reason of the defendant's failure to furnish power. And, if the plaintiff is entitled to recover in this action, you will also allow as part of the damages the reasonable rental value of the use of said direct-current motor during the time the same was so operated. In estimating the rental value of said building during such time as said direct motor was operated, you will take into consideration the amount, if any, which such reasonable rental value was enhanced by reason of the operation of said elevator by such direct motor during such time as it was so operated.

It is strenuously insisted that these instructions are

erroneous, in that they announce an incorrect rule for the assessment of damages. Upon no other branch of the

8. BREACH OF CONTRACT: damages: recovery. law is there so much difficulty as with the proper measure of damages. There seem to be no fixed and settled rules for such

cases. Damages are awarded by way of compensation to make the party who suffers from tort or breach of contract whole, and in cases of breach of contract they are such as arise in the natural course of things, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of its breach. It is also a general rule that a party injured by reason of a breach of contract must make reasonable exertions to render the injury as light as possible, and he can not recover for any loss which he might have avoided with ordinary care and reasonable expense. Assuming then, as we must, that the defendant did not furnish the kind of current that it agreed to, we have to decide what is fair compensation to the plaintiff by reason of this breach of contract, and, if it be the rental value or the diminished rental value of the building, for how long may this continue.

The contract in this case was made in the year 1902, and defendant did not change its system to the regular three-phase until 1905. Whilst the evidence is not very

9. SAME: contract for electrical power: breach: damages. clear upon the subject, it appears that the defendant was attempting to make the motor work, changing its parts and connections, its wires, etc., until about the middle of February, 1903, when all further attempts in this direction were abandoned; but from that time on until the change made by defendant in its system the Groneweg Company received and paid for the current defendant was able to supply and used the motor and elevator as they could without any attempt to change or replace the same. The change of current was made in the fall of 1905, but this was not for

the special benefit of the Groneweg Company, nor was it induced to continue the use of the motor for these two years by reason of any promise on the part of the defendant. The evidence tended to show that the elevator was necessary to the full and complete use of the building, that the Groneweg & Schoentgen Company could not obtain a satisfactory electric current from any other source to run the motor, and that until the spring of the year 1903 the defendant was making every effort it could to supply the current it had agreed to furnish without avail. Until it ceased its attempts to furnish the agreed current and fully abandoned its efforts in this direction, it is clear that under the rule adopted in *Brownell v. Chapman*, 84 Iowa, 504, plaintiff, as the assignee of the Groneweg Company, was entitled to the difference in the rental value of the building with the current furnished as agreed and what it was reasonably worth with the current which defendant did in fact supply, unless the jury might have found that at ordinary trouble and for a not unreasonable expense plaintiff, or its assignor, might, by supplying a clutch or other device, have remedied the difficulty. In so far as the instructions are in line with this thought, they are correct.

But it will be observed that thereunder the jury was allowed to apply the same rule for the entire period covering more than two years during which defendant failed to furnish the agreed current, although it abandoned any attempt to do so in the spring of 1903, and plaintiff and his assignor, knowing of that fact, concluded to accept and pay for such current as was supplied without any complaint, and without effort to change the system by installing a new motor or any other form of motive power. Defendant, as we have said, did not promise to, nor did it, change its system in order to comply with its contract with plaintiff or its assignor. On the contrary it made every effort to adapt its current to the motor installed in the building until the spring of 1903, when it ceased any further effort

in this direction, delivered such current as it had, which plaintiff, or its assignor, accepted and paid for without objection or protest.

The rule of compensatory damages surely does not go to the extent contended for by appellee. Neither plaintiff nor its assignor could, after defendant had ceased its efforts to supply the current agreed upon, allow its building to remain vacant and unoccupied and collect rent for an indefinite time in the future because defendant did not and could not furnish the electrical current promised. If this were the rule, one who undertook to heat a large building at a given temperature, and who failed to make his appliance work, might be held for the rental value of that building, at least during the winter months, for an indefinite time in the future, limited only by the natural life of the building or of the plant to be installed. It is well known, of course, that there are many kinds of power for the running of elevators, both freight and passenger. Hydraulic, water, steam and gasoline are well-known systems for the running of elevators, and, when defendant abandoned its attempts to run the motor which had been designed for the movement of the elevator, plaintiff, or its assignor, could not sit idly by, and say: "We will charge to defendant the rent of this building until such time as it supplies the current it agreed to furnish." When the attempt to run the motor was abandoned, it was the duty of plaintiff, or its assignor, to accept what was being furnished as sufficient and adequate or to change its motive power by installing some other system which would operate the elevator to its satisfaction. Any other rule would make a vendor of heat, light or power responsible for the rent of buildings for an indefinite and almost unlimited future time. Of course, whatever expense the owner of the building was put to after the abandonment of the contract by the vendor of the power in order to secure the full enjoyment and use of the elevator by change of system, installation of new

mechanism, substitution of motors, loss of time, etc., should be charged to the party in fault; but not the rental value for the entire term when neither was doing anything to cure the difficulties. This rule furnishes adequate compensation, and is not unreasonable or punitive. The one announced by the trial court in so far as it allowed for difference in rental value after the spring of the year 1903 was more than compensatory, and was not within the contemplation of the parties at the time the contract was made. It may be that as neither plaintiff nor its assignor did anything toward changing the system for operating its elevator after defendant abandoned its effort to furnish a current which would start the motor when the elevator was loaded to capacity, but accepted and paid for such current as was furnished, that from that time on plaintiff should be limited in its recovery to such damages based upon differences in rental value as occurred before that time. This question is not argued, and we do not make any definite pronouncement upon the matter at this time. At most, plaintiff and its assignor could not recover differences in rental value after defendant had ceased its efforts to supply the current agreed upon for more than that reasonable time thereafter which was necessary to change the system in order to get the amount of power required. Charging to defendant this difference in rental values and the expenses of making the change will make plaintiff whole and furnish complete compensation, while allowance of difference in rentals for all future time would amount to a penalty imposed upon defendant for its failure to furnish a certain kind of electrical current as agreed. Defendant could not go upon plaintiff's premises for the purpose of changing motors or supplying the motor then installed with a clutch or other device to aid in starting the machine. These matters were within the exclusive control of the plaintiff or its assignor, and they were bound to so

use their property as to save defendant from damages for the breach of its contract.

There are not many cases similar to this, but such as we have been able to find lend support to the views expressed. Thus in *Cable v. Leeds*, 6 La. Ann. 223, where a mechanic undertook to make and deliver a crank to a steamer as soon as possible, he was held liable only for damages due to the detention of the steamer during the time actually necessary to obtain a suitable crank after a reasonable period had elapsed for the performance of his agreement. See, also, *Brown v. Foster*, 51 Pa. 165. So where a person purchased of a manufacturer a planing machine selecting it with reference to its weight and finish, the agreement being that he was to have the identical machine he had selected, and erected a building and prepared it at a large expense for the especial purpose of accommodating such machine, and the manufacturer refused to send him the machine purchased, having notice of the preparation therefor, by reason of which some time was lost before a machine could be put in operation, the purchaser was allowed to show in an action for the breach what would have been a fair rent for the use of the building and machinery if in running order during the time they lay idle in consequence of the refusal to deliver the machine, not to exceed, however, a period reasonably necessary for supplying another machine of similar character after being advised of the vendor's refusal to send the machine purchased. *Benton v. Fay*, 64 Ill. 417. This is merely following the general rule that a purchaser claiming damages can recover no more than it would cost him, with reasonable diligence, to supply himself by resort to the market or other source or means of supply. *Berkey & G. Co. v. Hascall*, 123 Ind. 502 (24 N. E. 336, 8 L. R. A. 65); *Beymer v. McBride*, 37 Iowa, 117. Stated in another way, it is the duty of the purchaser to protect himself from damages by reason of defective or dilatory



work if he can do so at a moderate expense or by ordinary and reasonable efforts. *Laporte Imp. Co. v. Brock*, 99 Iowa, 489; *Mather v. Butler Co.*, 28 Iowa, 259. These conclusions also have support in *Graves v. Glass*, 86 Iowa, 261; *Nye v. Alcohol Works*, 51 Iowa, 129; *Russell v. Giblin*, 16 Daly, 258 (10 N. Y. Supp. 315), and *Martin v. Seaboard*, 70 S. C. 8 (48 S. E. 616).

In instructing the jury that it might allow plaintiff the difference in the rental value of the building with and without the current agreed upon during the entire time from 1902 to 1905, when defendant changed its system, we think the trial court was in error. Plaintiff was entitled only to this difference for the time that defendant was endeavoring to comply with its contract, and for such reasonable time thereafter as would have enabled the Groneweg Company to have substituted some other known and approved motive power for the running of its elevator. This is the most it would be entitled to under any circumstances. Whether or not it should have supplied the motor with the clutch or other device to enable it to be started before that time was a fair question for a jury. If, in the exercise of reasonable care and prudence at moderate or small expense, it could have remedied the difficulty, it should have taken that course, and, if a jury should find that this was the proper course to have been pursued, the plaintiff would not have been entitled to the rental value of the building after it became the duty of the Groneweg Company to remedy the defect. As already intimated, this question of the measure of damages is always difficult, and many times incapable of satisfactory solution. Adequate compensation for the loss incurred is the result aimed at; and nothing uncertain or speculative is to be awarded. Moreover, it is the duty of the purchaser to use reasonable efforts and to go to any moderate and reasonable expense to save himself from the consequences of a breach of contract. He can not sit idly by and charge everything

to the party at fault. Nor can he fold his hands and hold the other party liable for the rent of his building for an indefinite period. We have examined all the cases cited by appellee's counsel, and find none which run counter to the views herein expressed.

On account of the errors pointed out, the judgment must be, and it is, *reversed*.

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IN RE THE APPEAL OF ALBERT HEAD from the action of the joint Boards of Supervisors of Greene and Calhoun Counties, Iowa, in establishing Drainage District No. Eight in Greene County and No. Fifty-five in Calhoun County, Iowa.

**Drainage:** JOINT ACTION OF COUNTY BOARDS: APPEAL: NOTICE: JURIS-  
 1 DICTION. Upon an appeal from the action of the boards of supervisors relating to the establishment of a drainage district extending into two or more counties, and respecting a matter concerning which the several boards are required to act jointly, the notice must be served upon the auditor of each county into which the district extends; and when served upon the auditor of only one of the counties the court does not acquire jurisdiction.

**Same:** RECORD OF BOARD PROCEEDINGS. Mere failure of the auditor to  
 2 keep a record of the proceedings relating to the establishment of a drainage district in a separate drainage record book will not invalidate the proceedings.

**Inferior tribunals:** JURISDICTION: PRESUMPTION: BURDEN OF PROOF.  
 3 Jurisdictional facts need not be shown of record but will be assumed in support of the findings of tribunals of inferior and limited jurisdiction the same as in the case of courts of general jurisdiction; and the burden is upon the party attacking the jurisdiction of such a tribunal to overcome this presumption.

*Appeal from Greene District Court.*—HON. F. M. POWERS,  
 Judge.

SATURDAY, DECEMBER 19, 1908.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

THIS is an appeal from the action of the district court of Greene County in confirming and establishing a joint drainage district in Greene and Calhoun Counties created by the action of the boards of supervisors of said counties upon proper petitions filed according to law, which drainage district includes certain lands belonging to Albert Head, the appellant.—*Affirmed*.

*Wilson & Albert*, for appellant.

*M. Hutchinson and Howard & Howard*, for appellees.

DEEMER, J.—Pursuant to law there were filed with the boards of supervisors of Greene and Calhoun Counties, Iowa, petitions, signed by eight or more persons, for the establishment of a drainage district comprising lands in both counties. With these petitions were bonds in statutory form signed by two of the petitioners. The board of supervisors of Greene County approved the bond and appointed one Forbes to act in conjunction with the commissioners to be appointed by the board of supervisors of Calhoun County. The board of supervisors of Calhoun County appointed one Mills to act as commissioner for it, and according to the return made by them these two appointed one Thompson, a competent engineer, to act with them. The three viewed the proposed district and recommended its establishment as prayed, with certain exceptions, which were stated. Accompanying their report was a map or plat showing the lands included, the courses and depths of the ditches or drains, and the character thereof, including the sizes of tiles to be used. They also gave an estimate of the cost and stated that the number of acres to be drained were 5,025. The report also contained the names of the owners of the lands within the district, and

some other matters not necessary to be mentioned at this time. Thereafter and during the month of September, 1906, the county auditor of Greene county caused notices to be served upon the parties owning lands within the district of the report of the commissioners and engineer, and that all claims for damages should be filed not less than five days before a joint meeting of the boards of the two counties, which was fixed for October 12, 1906, at the office of the county auditor in Greene County. These notices were served personally upon plaintiff and some thirty-two others, and by publication upon the remainder; the last of said publications being on September 20, 1906. Head filed objections to the establishment of the district with the auditor of Greene County, Iowa, on October 2, 1906, which embraced something like twelve grounds, and he also filed a claim for damages in the sum of \$7,500. The boards of the two counties met on the day set in joint session and heard the objections to the establishment of the district, and, finding that claims for damages were on file, the meeting was adjourned until November 14, 1906, to be reconvened at the auditor's office in Greene County. The joint boards reconvened November 14, and the petitioners for the establishment of the ditch were permitted to amend their petitions to make them conform to the recommendations of the commissioners and the engineer, and after a full hearing it was found that the drainage districts known as No. 8 in Greene County and No. 55 in Calhoun County were necessary to the public health, benefit, utility, convenience, and welfare, and, in view of the claims for damages filed by Head and others, appraisers were appointed to award damages; they to report to the joint board at Rockwell City, in Calhoun County, on December 21, 1906, to which time and place the meeting was adjourned. The appraisers named entered upon the discharge of their duties and in due season made report of their findings, in which they awarded Head damages in the sum of \$1,500.

Payment of these damages was guaranteed by one of the petitioners for the drain or ditch. On December 12, Head filed something like thirty more objections to the establishment of the district, in which he attacked all the prior proceedings, and also challenged the constitutionality of the law, and further objected to the allowance for damages. These objections were disregarded by the joint boards, the drainage district was established, and damages fixed according to the award of the appraisers. Further proceedings were also directed according to law. Albert Head appealed to the district court of Greene County from the action of the joint boards sitting in Calhoun County by filing bond with and giving notice to the county auditor of Greene and not with and to the auditor of Calhoun County. The auditor of Calhoun County did not certify a copy of the proceedings in his county, and, when the case was reached for trial in the Greene County district court, appellees, the drainage district, and others moved to dismiss, for the reason that no full and complete transcript of the proceedings had been filed as required by law. Appellees also moved to dismiss the appeal because no notice was served or filed with the auditor of Calhoun County, and for the further reason that no bond was executed or filed with him as provided by law. It was also contended that no objections filed after October 12, 1906, could be considered. After a full hearing the trial court confirmed the action of the joint boards and dismissed Head's appeal. This appeal followed.

The first proposition in the case is the jurisdiction of the district court and of this court. It is contended that appellant, Head, should have given bond to and served notice of his appeal upon the auditor of Calhoun County, as well as upon the auditor of Greene County. This contention involves a construction of certain sections of the so-called drainage act, which we here set out either in substance or in extenso. Generally speaking, the board of

supervisors of the county in which the drainage district is to be established has exclusive original jurisdiction thereof, but it is provided by section 1949 of the Code that:

When the improvement petitioned for extends into or through two or more contiguous counties or parts thereof, the boards of supervisors of each of the counties, upon the presentation of the petition, shall appoint a commissioner, and the commissioners thus appointed, within twenty days after the selection of the one last named, shall meet and locate the same through or into said counties. They shall appoint a competent engineer, who shall have charge of the construction of the work, and with him shall make a survey of the proposed levee, ditch, drain, or change of water course, and make written return thereof to the county auditors of the several counties in which the location shall be made in whole or in part; which return shall in all respects be the same as is required in case of the location of such improvement in but a single county; and thereafter all subsequent proceedings relating to the condemnation or taking of land, the compensation therefor, damages on account of the work, assessment of lands for taxation, and in every other matter and thing, shall in all respects be the same as in like cases where the improvement is situated in but one county. Appeals in such case may be taken to the district court of the county where the land is situated.

Section 30, chapter 68, Acts 30th General Assembly (section 1989a(29), Code Supp. 1907), also contains this provision:

When the desired levee or drainage district extends into or through two or more counties and embraces land in two or more counties, the petition of one or more owners of land to be affected or benefited by such improvement shall be presented to the county auditor of each county into or through which said levee or drainage district will extend, accompanied by a bond to be filed with the county auditor of each of the said counties at the time of filing such petition, conditioned as provided when the district is

wholly within one county, in an amount and with sureties satisfactory to, and approved by, the board of supervisors. Upon the presentation of such petition and the approval of such bond, the board of supervisors of each of said counties shall appoint a commissioner, and the commissioners of the several counties thus appointed shall meet within ten days thereafter and appoint a competent engineer, and such commissioners and engineer shall together make a survey of the entire lands embraced in the district, and shall determine what improvement or improvements in the way of levees, drains, ditches or changing of natural water courses are necessary for the reclamation of the lands described in the said petition; the engineer shall make a plat of all of the lands of said district, showing thereon the proposed improvements, the elevations and levels of said lands, so far as he may deem necessary, and a profile of said levee, drains, ditches or changes in any natural water course and shall file a copy in the auditor's office of each of said counties, together with a full return of said commissioners and engineer, explaining the situation, describing the lands, the improvements, what effect said improvements will have upon the lands, of the district, the course and length of any levee, drain, ditch or change of any natural water course through each tract of land, the estimated cost of the same, the dimensions of said improvement together with the names of the owners of all lands included within said district, as shown by the transfer books in the auditor's office, and which in their opinion will be affected or benefited thereby, together with such other facts and recommendations as to them shall seem advisable, and especially whether or not in their judgment such levee or drainage district should be established. Immediately upon the filing of such return, plat and profile, if such recommends the establishment of the levee or drainage district, each county auditor of said counties shall cause the owners of the lands, as shown by the transfer books in the auditor's office, and also the person in actual occupancy of any lots or lands in the district and also each lien holder or other incumbrancer, as shown by the county records, of any land through or abutting upon which the proposed improvement extends, to be notified of the time and place where the boards of the several counties will meet in joint session for the considera-

tion of said petition and return. Such notice shall be the same and served in the same time and manner as provided in this act when the levee or drainage district is wholly within one county.

Sections 31, 32, 33, 34 and 35 read in this wise:

Any person claiming damages as compensation for, or on account of, the construction of such improvement shall file his claim in writing therefor in the office of the county auditor of the county in which his land is situated, at least five days prior to the time at which the petition has been set for hearing, and on failure to file such claims at the time specified shall be held to have waived his right thereto.

At the same time set for hearing such petition the boards of the several counties shall meet at the place designated in said notice and sit jointly in considering the petition and proceed in the same manner as provided in section five of this act, except that if it becomes necessary to appoint appraisers, the boards of supervisors acting jointly shall appoint one appraiser from each county, and if said levee or drainage district extends into or through only two counties then the two appraisers shall choose a third, each of whom shall have like qualifications as provided where the improvement is wholly within one county and they shall then proceed in the same manner and make the same return as provided in section six of this act except that a copy thereof shall be filed in the auditor's office of each of the several counties. After filing of the report of such appraisers the further proceedings of the boards of supervisors acting jointly shall be the same as in this act provided where the levee or drainage district is wholly within one county so far as applicable except as herein otherwise provided.

If the boards of supervisors, acting jointly, shall establish the levee or drainage district, they shall appoint a commission, one of whom shall be selected from each county and in addition thereto a competent engineer, each of whom shall have the same qualifications as provided where the district is wholly within one county; and said commission shall within twenty days go upon and view the premises



and classify the same as hereinbefore provided where the district is wholly within one county, and in addition there-to shall make an equitable apportionment of the costs, expenses, cost of construction, fees and damages assessed for the construction of such improvement or of the repairing or reopening the same, and make report thereof as provided where the improvement is wholly within one county, except a copy of said report shall be filed with each of the several county auditors. Immediately upon the filing of such report the several county auditors, acting jointly, shall cause notice to be served of the time when and the place where the boards of supervisors will meet and consider such report, which notice shall be the same and served in the same time and manner and all proceedings thereon shall be the same as provided where the district is wholly within one county, except after the amount to be assessed and levied against the several parcels or tracts of land shall have been apportioned and finally determined, the several boards of supervisors acting separately, and within their own counties, shall proceed to levy and collect the taxes thus apportioned in the same manner as provided where the district is wholly within one county, and they may issue improvement certificates or may sell bonds for the full amount of the benefits apportioned to such county.

If the boards of supervisors, acting jointly, shall establish such levee or drainage district, the auditors of the several counties shall immediately thereafter, acting jointly, cause notice to be given of the time and place of the meeting of the boards for letting the contract or contracts for the construction of the improvement. The notices, bond and all other proceedings in relation to letting the contract or contracts shall be the same as in this act provided where the district is wholly within one county, except that the several boards shall act jointly.

At the time of establishing the levee or drainage district the boards of supervisors shall appoint a competent engineer to have charge of the construction of the work, and they shall fix his compensation therefor, and he shall before entering upon and taking charge of said work give bond to the counties for the use and benefit of the levee or drainage district approved by the boards of supervisors, in such sum as they may direct, conditioned for the faith-

ful discharge of his duties. The engineer in charge of the work shall furnish the contractor monthly estimates of the amount of work done on each section and the amount due from each county, a duplicate of which shall be filed with the auditor of each of the several counties. Upon the filing of such statement each auditor shall draw a warrant, or deliver to him improvement certificates, as the case may be, in favor of the contractor for eighty per centum of the amount due from his respective county. When said improvement is completed to the satisfaction of the engineer in charge and accepted by the boards of supervisors, the engineer in charge shall certify such fact to the several county auditors and each county auditor shall draw a warrant in favor of the contractor, or deliver to him improvement certificates, for the balance due from his respective county.

Section 36, with reference to appeals, reads thus:

Any person or persons aggrieved shall have the right to appeal in the same time and in the same manner as provided when the district is wholly in one county, except that if the appeal is taken from the action of the boards in establishing the levee or drainage district, such appeal may be taken to the district court of either county in which the district or some part thereof is located. If said appeal is from the award of damages or assessment of benefits the appeal shall be taken to the district court of the county in which the land affected is located.

Section 38 provides that:

Whenever the district is located in two or more counties, the boards of supervisors shall have power and authority to adjourn from time to time and meet in special session and in all cases shall have the same jurisdiction, power and authority as provided where the improvement is wholly within one county, and all proceedings shall be the same so far as applicable and not herein otherwise provided.

Sections 1940-1946 and section 1989a(3) of the Code

Supplement of 1907 provide for notices to the owners of land which is to be taken into the drainage district, personal upon residents and by publication on nonresidents, also notices of like kind after the engineer has made his report giving his estimate of expenses and damages suffered and fixing a time for the hearing and for the filing of objections. And by section 1989a(3) it is also provided that:

If at the date set for hearing before the board of supervisors, it should appear that any person entitled to notice, as provided in this section, should not have been served with notice for the time, or in the manner as provided herein, the board may postpone said hearing and set another time for the same, and notice of such day of hearing may be served on such omitted parties in the manner and for the same length of time, as provided in this section, and by fixing said new day for hearing and by adjourning said proceedings to said time, the said board of supervisors shall not be held to have lost jurisdiction of the subject matter of said proceeding, nor of any parties so previously served with notice.

By section 1989a(5) it is provided that:

The board of supervisors at the session set for the hearing on said petition, which session may be regular, special or adjourned, shall thereupon proceed to hear and determine the sufficiency of the petition in form and manner (matter), which petition may be amended as to form and substance at any time before final action thereon, and, if deemed necessary, the board may view the premises and if they shall find that such levee or drainage districts would not be for the public benefit or utility nor conducive to the public health, convenience or welfare, they shall dismiss the proceedings; but, if they shall find such improvement conducive to the public health, convenience or welfare, or to the public benefit or utility and no claim shall have been filed for damages as provided in section four hereof, they may if deemed advisable locate and establish the same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem

best, and at said hearing, the board may order the said engineer or new engineer appointed by them if deemed advisable, to make further examination and report to said board as to said proposed improvement, and if they determine that further examination and report shall be made, or if claims have been filed for damages, as provided in section four hereof, then the board of supervisors shall proceed no further than to determine the necessity of the levee or drainage districts and further proceedings shall be continued to an adjourned, regular or special session, the date of which shall be fixed at the time of the adjournment; and the county auditor shall appoint three appraisers to assess such damages who shall be disinterested freeholders of the county and not related to any party interested in the proposed improvement nor themselves interested in a like improvement; and the engineer appointed by the board of supervisors shall accompany said appraisers and furnish such information as may be called for by the appraisers concerning the survey of said improvement.

There are several sections relating to appeals. In 1898a(6), Code Supp. 1907, it is provided:

Any aggrieved party may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor at any time within ten days after such finding, at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal unless the finding of the district court shall be more favorable to the appellant or appellants than the finding of the board, which appeal shall be tried in the district court as an ordinary proceeding, except that when the appeal is from the order of the board in establishing or refusing to establish the levee or drainage district, it shall be tried as in equity and the appearance term shall be the trial term. If the appeal is from the amount of damages allowed, the amount ascertained in the district court shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to

the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the court. How the costs shall be distributed among the litigants and against whom the same shall be taxed shall rest in the discretion of the trial court.

Section 1989a(14) also provides for an appeal and contains a further provision with reference to the record, which will be observed from its reading:

An appeal may be taken to the district court from the order of the board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages. The appeal herein provided shall be tried in the district court as an action in equity and the appearance term shall be the trial term; and when several appeals are taken and pending in the district court by landowners of the same drainage district whose lands have been assessed by the board, the court may, in its discretion, order the consolidation of such cases, and try the same as one cause of action. When any appeal is taken from any order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of such district. The board shall provide a book to be known as the 'Drainage Record' and the county auditor shall keep a full and complete record therein of all proceedings in each case and upon an appeal being taken shall make a full and complete transcript thereof and transmit the same to the clerk of the district court on or before the first day of the term to which the appeal shall be taken.

It has seemed necessary, in view of the claims made

by the respective parties, to set out these statutes at length. It is conceded that appellant, Head, filed no bond with and gave no notice to the auditor of Calhoun County, and that his appeal is not simply from the award of damages, but to the establishment of the drainage district or to the inclusion of his lands therein. As the

1. DRAINAGE:  
joint action  
of county  
boards:  
appeal:  
notice:  
jurisdiction.

action from which the appeal is taken is a joint one of the two boards, and as all persons whose lands are included are interested in the proceedings, and neither board can act without the concurrence of the other, and as the final action of the district court, under the power given it by statute, might very materially affect the orders made by the respective boards in joint session, we think the notice of appeal should have been given to the auditor of each county. Without such notice, the district court had no jurisdiction to enter an order made by the two boards in joint session. The Calhoun County board was not notified of the appeal, and the district court on appeal had no jurisdiction over it. Neither board had authority to represent the other. Joint action was necessary, and, as a complete record is to be kept in each county, it seems clear, from a reading of the statutes, that to give the district court jurisdiction to annul or modify the action of the joint boards it must have jurisdiction thereover by the proper notice. Neither auditor may properly be said to represent any one but his own county or those living therein. The exact point for decision is a construction of the statutes quoted, in the light of some fundamental rules, and nothing is to be gained from further argument. As the district court of Greene County had no jurisdiction of the matter, we do not have on appeal and this is an end to the controversy. However, we may with propriety add that we have gone over the points made by appellant's counsel and discover no reason for disturbing the order of the trial court.

Appellant objects to the proceedings because the auditor of Calhoun County did not keep a record of the proceedings there in a separate drainage record book, as by statute provided. It does appear, however, <sup>2. SAME:</sup> that all the proceedings with reference to <sub>record of board proceedings.</sub> this joint drainage district were recorded in the minutes or record of the proceedings of the board of supervisors of his county, and that he duly filed in his office and presented at the trial all petitions, reports, objections, papers, etc., filed with him. This appeal is from the joint action of the boards of the two counties, and in his objections originally filed appellant made no objection to the record of the proceedings in Calhoun County. This matter was attempted to be covered in the additional objections filed by him after the time had elapsed for the filing of objections. Moreover, the record discloses full jurisdiction on the part of the joint boards of the subject-matter and of the persons, and the failure of the auditor, a mere ministerial officer, to enter the proceedings upon a proper book, would not defeat that jurisdiction. By section 47 of the so-called drainage act (Acts 30th General Assembly, chapter 68), it is provided:

The provisions of this act shall be liberally construed to promote the leveeing, ditching, draining and reclamation of wet, overflown or (of) agricultural lands; the collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural water course provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from. But if upon appeal the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be

a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies.

It has never been held that failure to record the proceedings of a judicial or *quasi* judicial tribunal in a proper book defeats its jurisdiction.

Moreover, it is provided, in section 4648 of the Code, that: "The proceedings of all officers and courts of limited and inferior jurisdiction within the state shall be

3. INFERIOR  
TRIBUNALS:  
jurisdiction:  
presumption:  
burden of  
proof.

presumed regular, except in regard to matters required to be entered of record, except where otherwise expressly declared." This gives the same force and effect to proceedings of tribunals of inferior and limited jurisdiction as applies to courts of general jurisdiction; that is to say, jurisdictional facts need not be shown by the record, but will be assumed in support of the findings. In support of a judgment or decree it is presumed that notice essential to the validity of the court's action was given, and that process was regularly and properly served or appearance made. The same presumption obtains by reason of the statute to the proceedings of inferior tribunals. *Loving v. Pairo*, 10 Iowa, 282; *Pursley v. Hayes*, 22 Iowa, 11; *Wright v. Marsh*, 2 G. Gr. 94.

These suggestions answer appellant's proposition that the records do not show proper notice to the landowners required by the statutes quoted. Notice, either personal or by publication, is shown to all parties in interest; but it is argued that, as no affidavit of nonresidence or of other facts justifying service by publication is shown, the boards were without jurisdiction. The burden was upon appellant to show that none such were made or filed, and this he did not do. Hence he did not overcome the presumption which obtains in such cases. The case is distinguishable from *McBurney v. Graves*, 66 Iowa, 314, in that there was no notice or proof of publication filed in that case,



as there was here, and no recitation of proper service. Appellant's positions are somewhat inconsistent. His counsel say that no notice of appeal was necessary to be served upon Calhoun County, and no transcript of the records was required from that county, and, on the other hand, they are insisting that, in the absence of a proper and complete record of the proceedings from that county, there was no jurisdiction over the drainage matter. Both of these propositions can not, in the nature of things, be correct. As we view it, notice was necessary to the proper authorities of Calhoun County in order to give the district court jurisdiction, and, on the other hand, a complete record of the proceedings in Calhoun County is not essential to the validity of the proceedings. The burden was upon appellant to show that the landowners were not properly served with notice of the proceedings.

Complaint is made of the report and plat made and returned by the commissioners. We have examined it with care, and find no such defects as to invalidate the proceedings. The provisions of the law relating thereto were substantially complied with. The case is materially different from *Zinser v. Board*, 137 Iowa, 660, and other like cases relied upon by appellant. Plaintiff's land was, in our judgment, properly included in the drainage district, and we discover no errors which will justify a reversal.

The order and judgment of the trial court must be, and they are, *affirmed*.

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ELIAS DOTY, Appellant, v. THE CITY OF CEDAR RAPIDS,  
Appellee.

**Action to quiet title:** ALLEGATION OF TITLE. An action to quiet title can not be based on a claim that there is no ownership of the property in anyone, but the plaintiff must allege some title or interest, legal or equitable, in himself.

*Appeal from Linn District Court.*—HON. F. O. ELLISON,  
Judge.

WEDNESDAY, JANUARY 13, 1909.

REHEARING DENIED TUESDAY, MARCH 16, 1909.

*Elias Doty* and *B. L. Wick*, for appellant.

*James W. Good* and *H. E. Spangler*, for appellee.

EVANS, C. J.—This is an action which belongs to no class. The petition prays for undefined relief which sustains no relation to its allegations. A brief and succinct statement of the petition would necessarily be unintelligible. We therefore set it out in full from appellant's abstract as follows:

On the 30th day of August, 1907, the plaintiff filed in the Linn district court a petition, stating his cause of action as follows:

(1) That he is a citizen of Iowa.

(2) That the defendant is a municipal corporation, and at a time held title in trust to block sixty-four (64) of the original town, now city, of Cedar Rapids, Iowa, said block having been dedicated to the public for park purposes by the original plattees thereof, and consists of a body of land three hundred feet square, bounded on the northerly side by C Avenue, on the easterly side by Fifth Street, on the southerly side by B Avenue, and on the westerly side by Fourth Street.

(3) That prior to August 16, 1878, said defendant city inclosed said block sixty-four (64), and converted said block to municipal uses to the exclusion of the public, and that on August 16, 1878, said defendant city did by ordinance (recorded in volume 2, p. 117, Records of Ordinances of said City of Cedar Rapids, Iowa) grant to the Chicago, Milwaukee & St. Paul Railway Company a strip

of land one hundred feet wide by three hundred feet long off the westerly side of said block and adjoining Fourth Street.

(4) That on May 5, 1882, and on May 2, 1884, said city did by ordinance (recorded in City Records, volume 2, pp. 195, 268, respectively) grant to the Industrial School of Cedar Rapids the southerly one-half of the easterly two hundred feet of said block.

(5) That on May 28, 1887, said defendant city did by ordinance (recorded in volume 2, p. 528, City Records of Cedar Rapids) grant to the Cedar Rapids & Chicago Railway Company its successors and assigns a strip of said block one hundred feet wide extending from C to B Avenues and adjoining the described strip heretofore granted to the Chicago, Milwaukee & St. Paul Railway Company.

(6) That on March 9, 1901, said defendant city did by ordinance (recorded in volume 1, p. 237, Revised Ordinances of said City), declare said block sixty-four (64) to be unsuitable, insufficient, and unnecessary for the purpose for which it was originally acquired by the city, and it is hereby conveyed, assigned and transferred to the Sisters of Mercy of Cedar Rapids, Iowa, all except the one hundred foot strip granted to the Chicago, Milwaukee & St. Paul Railway Company.

(7) That the said Sisters of Mercy and the Cedar Rapids & Chicago Railway Company never entered on or occupied, possessed, or in any manner accepted the grants of said defendant city to them.

(8) The Industrial School of Cedar Rapids erected buildings on their grants soon after the grants were made by said city.

(9) That on March 15, 1904, the city marshal of defendant city removed this plaintiff's building from a vacated portion of First Street, in said city, and deposited said building on said block of land in such a manner that it rested partly on the strip described in paragraph 5 of this petition and wholly on the grant to the Sisters of Mercy, described in paragraph 6 herein, wherein plaintiff continued to occupy said building as a photograph gallery.

(10) That in the month of April, May or June, 1905, the Industrial School of Cedar Rapids voluntarily vacated

the land granted to them without ever entering the same for taxation or having any title quieted in them.

(11) That in the month of April, 1905, the defendant city vacated said easterly two hundred feet of block sixty-four (64) by removing all city property therefrom, including fences, buildings and all chattels, leaving this plaintiff solely in possession of the easterly two hundred feet of said block sixty-four (64).

(12) That the defendant has for more than 25 years wrongfully appropriated said block sixty-four (64) for municipal purposes and fenced the public from out their own park.

(13) That on the 21st day of July, 1905, said defendant city did by its attorney, J. N. Hughes, enter on said easterly two hundred feet of said block sixty-four (64) with a superior force of more than a dozen men, and, without any process of law, forcibly ejected plaintiff's building therefrom, to the damage of this plaintiff.

(14) Plaintiff in the month of March, 1907, filed with the defendant city a written request for quitclaim deed to the easterly two hundred feet of block sixty-four (64), original town, now city, of Cedar Rapids, as provided by law in section 4226 of the Code of Iowa of 1897, which request has not been granted.

Wherefore plaintiff prays the court to quiet the title to the easterly two hundred feet of block sixty-four (64) of the original town of Cedar Rapids, Iowa, in him as against any and all claims of the defendant city and for decree of court that defendant city has no further rights in said real estate, and for legal attorney's fees provided for in such causes, and such other equitable relief as the facts in this case demands. [Duly verified.]

To this petition a demurrer was interposed, and by the court sustained. The plaintiff elected to stand upon his pleading. The court entered judgment dismissing the petition, and the plaintiff appeals.

The only note of discord sounded in the petition appears at paragraphs 9 and 13. From the first of these it would appear that the city marshal wrongfully put plaintiff on the premises, and, from the second, that the city

attorney wrongfully put him off. There is no allegation in his petition that he has, or ever had, or even claimed, any title to any part of the premises, the title to which he now asks to have confirmed and quieted in himself.

The theory advanced in argument is that inasmuch as the city had lost its title by its alleged misuse, and by its ordinances of vacation, and inasmuch as the city marshal had deposited plaintiff's building upon such ownerless land, neither the city attorney nor any other person had a right to put him off, because he was maintaining a possession from which no one could oust him by any legal proceeding. The plaintiff claims that he thereby became vested with some kind of title to the real estate, and he asks the aid of a court of equity to quiet such title in him, and to protect him from further intrusion. The law has not developed to such a degree of ingenuity as to serve plaintiff's purpose in this regard. If the city attorney wrongfully removed the plaintiff by force of arms from the land in question, he has his appropriate remedy, which he does not seek to enforce in this action. He avers that the defendant city has no right or interest in the land described in the petition. He sets up no title or interest in himself, legal or equitable. We have therefore no jurisdiction in this case over the subject-matter. Plaintiff's only claim is based upon the contention that nobody owns the land. This is broad enough to include the plaintiff as one of the nonowners.

It is argued that an affirmance on this appeal will "establish a precedent jeopardizing all titles resting on city vacation of public grounds." This is probably so. The demurrer was properly sustained.—*Affirmed.*

JULIA M. NOLAN, Appellant, v. MICHAEL FOLEY, Appellee.

**Real property:** CONTRACT OF SALE: FORFEITURE: TENDER: WAIVER.

- 1 Where the vendor of property under a contract providing for forfeiture for nonpayment served notice of forfeiture, and upon tender within the statutory period of the amount believed by the purchaser to be due on the contract made no objection to the amount, but insisted upon the forfeiture and refused the sum offered, there was a waiver of the right to further object to the amount tendered.

**Same:** RENTS AND PROFITS: ACCOUNTING. Where the vendor of prop-  
2 erty has lost the right to forfeit the contract, but wrongfully insisting thereon goes into possession, he must account to the purchaser for the rents and profits; and the court should determine the amount due under the contract, order payment thereof within a specified time, or in default of payment order foreclosure of the purchaser's interest.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE,  
Judge.

TUESDAY, MARCH 16, 1909.

SUIT to recover the possession of certain real estate, for an accounting of money had and received by defendant as payments upon a contract for the purchase of real estate, and for rents and profits of the land during the time defendant was in the possession thereof. Decree dismissing plaintiff's petition, and she appeals.—*Reversed and remanded.*

W. R. Hart, for appellant.

Brett & Porter and George C. Fancher, for appellee.

DEEMER, J.—On February 11, 1902, defendant, as

party of the first part, and plaintiff, as the second party, made and entered into a written contract, whereby defendant agreed to lease to plaintiff the real estate in controversy for the sum of \$1,050, payable \$100 in cash and the sum of \$10 per month thereafter until the whole with interest was fully paid. Plaintiff was also to pay all taxes and assessments against the land, and to keep the property insured for the sum of \$500. The written contract also contained these provisions:

And it is expressly agreed by and between the parties hereto that the time and times of payment of said sums of money, interest and taxes aforesaid is the essence and important part of the payments or agreements above mentioned to be performed by the party of the second part in consideration of the damage, injury and expense thereby resulting or that may be incurred by or to the party of the first part thereby, this agreement shall be void and of no effect, and the party of the second part shall have no claim in law or equity against the party of the first part, nor to the above-mentioned real estate, nor any part thereof, and any claim or interest or right the party of the second part may have had hereunder up to that time by reason hereof, or of any payments or improvements made hereunder, shall on all such default cease and determine and become forfeited, without any declaration of forfeiture, re-entry or any act of the party of the first part. And if the party of the second part, or any other person or persons, shall be in possession of said real estate, or any part thereof, he or they will peacefully remove therefrom, or in any default thereof he or they may be treated as tenants holding over unlawfully after the expiration of a lease, and may be ousted and removed as such. But if such sums of money, interest and taxes are paid as aforesaid, promptly and at the time as aforesaid, the party of the first part will, on receiving said money and interest, execute and deliver at his own cost and expense, a warranty deed of said premises as above agreed, and abstract of title.

On February 27, 1905, defendant caused the following notice to be served upon plaintiff and her husband:

Des Moines, Iowa, February 27, 1905. Mrs. Julia M. Nolan and James M. Nolan, her husband: You are hereby notified that the lease agreement made and entered into on the 11th day of February, 1902, on the following described property, to wit: The south  $33\frac{3}{4}$  feet of lot number eighteen (18) of the official plat of the northwest quarter of the northwest quarter of section four (4), township seventy-eight (78), range twenty-four (24), now included in and forming a part of the said city of Des Moines, Iowa, by and between Michael Foley, party of the first part, and Julia M. Nolan, party of the second part, is null and void for default in monthly payments. Michael Foley.

Plaintiff was in actual possession of the property until September of the year 1902, when she moved to Maloy, Iowa, and thereafter she rented it to various parties, until about February of the year 1905, when defendant directed her then tenant, a Mrs. Smith, not to pay her any more rent. Defendant moved into the property and occupied it with Mrs. Smith until about April of the year 1905, when Mrs. Smith left the property, leaving it in the full possession of the defendant. On the trial defendant conceded that plaintiff had made all payments called for by her lease until September 24, 1904, except the ones due in March and August of that year. On March 1, 1905, plaintiff caused the following notice to be served upon the defendant:

To Michael Foley: I hereby tender you the sum of fifty dollars (\$50) in full of amount due you to this date on contract of sale with Julia M. Nolan for the south thirty-three and three-fourths ( $33\frac{3}{4}$ ) feet of lot 18 of the official plat of the southwest quarter of the southwest quarter section 4-78-24, in and part of the city of Des Moines, Iowa. This tender is made for the purpose of keeping said contract in full force and effect and should you fail to accept the above money on the date of the service of this notice, this tender will be kept good and money held subject to your order at the office of R. G. Patton, 804 Observatory Building, Des Moines, Iowa.

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A tender of the money was actually made at that time, but defendant refused to accept it, claiming that the contract of lease or sale had been canceled. This action was commenced on February 23, 1906. The trial court found that plaintiff had forfeited all her right, title, or interest in and to the property, and dismissed the petition.

For appellant it is contended that defendant never legally forfeited the contract of sale, that plaintiff made a proper tender of all that was due under the contract, and is willing to pay whatever amount the court finds is yet due, and that she is entitled to a specific performance of her contract. On the other hand, it is insisted that the contract was properly forfeited, that plaintiff has never offered or tendered the amount due on her contract, and that the petition was properly dismissed.

Code, sections 4299, 4300, read as follows:

Sec. 4299. Any contract hereafter made for the sale of real estate in the State of Iowa, and which provides for a forfeiture of the vendee's rights therein upon the happening of certain conditions, shall not be forfeited or canceled unless thirty days before a declaration of forfeiture is made, a written notice be served upon the vendee . . . which notice shall be served in the same manner and by the same parties authorized to serve original notices, and shall contain a declaration of an intention to forfeit said contract, and the reason therefor.

Sec. 4300. For the period of thirty days after service of said notice the vendee or those claiming under him may discharge any unpaid payments and costs of service of notice of forfeiture or perform any conditions broken, and if said payments are made or conditions broken are performed within said period of thirty days, the right to forfeit for such defaults occurring before said notice was served is terminated.

Defendant gave the notice above set forth February 27, 1905, and on March 1st plaintiff gave the written notice of tender, and also offered defendant \$50 in money, which

he, defendant, refused to receive because he claimed the contract had been forfeited. He did not object to the amount tendered, but claimed a forfeiture of the contract, and that he would have nothing more to do with the plaintiff.

1. REAL PROPERTY:  
contract of  
sale: forfeit-  
ure: tender:  
waiver.

He now claims that \$70 was due at that time. It is admitted that plaintiff did not pay the taxes for the years 1905 or 1906, and that she did not offer to pay any. It is admitted that plaintiff was actually owing defendant at the time the tender was made \$70, instead of \$50, and it also appears without controversy that defendant did not object to the amount, but claimed a forfeiture of the contract. The testimony further shows that at the time he served the notice of forfeiture upon plaintiff he also notified plaintiff's tenant not to pay her any more rent; that he was the owner of the property. He engaged a room and board with the tenant, Mrs. Smith, and, when Mrs. Smith moved out April 1, he remained in the possession of the premises, and claimed to be the owner thereof. Taking all of the testimony together, we are clearly of opinion that defendant regarded the contract as forfeited upon the giving of the notice, and that he thereafter denied all rights of plaintiff, and refused to accept the tender because of the claim of forfeiture. Since April 1, 1905, defendant has received rent for the property at the rate of \$12.50 per month. When plaintiff made her tender to defendant, she honestly believed that she was offering him all that she owed. Defendant raised no objection to the amount, but claimed that the contract had been forfeited, and refused to accept the money.

Objections other than those interposed at the time the tender was made were waived. *Gilbert v. Mosier*, 11 Iowa, 498.

Conceding *arguendo* that the notice given by defendant was a sufficient compliance with section 4299, providing for a written notice of an intended declaration of for-

feiture, we think the tender made by the plaintiff of the amount which she claimed was due amounted to a performance under section 4300, and that as no subsequent declaration was made, but defendant went into possession and took the rents and profits, he must be held to an accounting, not only of the amount received from plaintiff, but from all other sources. Upon such an accounting being made, a decree will be entered fixing the amount still due and ordering payment of the same within a time to be fixed by the court, or a foreclosure for the amount so found to be due, as provided in sections 4297 and 4298 of the Code. It is impossible for us to make the accounting upon the record before us, and the case must be remanded for that purpose. Upon the whole record, we are impressed with the thought that the contract has not been forfeited, that plaintiff should have an accounting, and that a decree should be entered which will protect both parties.

The decree will be reversed and the cause remanded for one in harmony with this opinion.—*Reversed and remanded.*

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W. S. CONKLING, Appellant, v. CLARA M. YOUNG, and THE STATE BANK OF MAXWELL, Defendants and Appellees. A. C. ENFIELD and MRS. A. C. ENFIELD, Garnishees and Appellees.

**Attachment by garnishment:** DISCHARGE: APPEAL. Where judgment is rendered against an attaching plaintiff he must forthwith announce his intention to appeal and perfect the same within two days or he will lose all rights under the attachment; and this rule applies to attachment by garnishment.

**Bills and notes:** EXTENSION OF TIME: CONSIDERATION. A definite agreement for the extension of a note to a fixed time is a sufficient consideration for the extension, although the maker parts with nothing but simply agrees to keep the money for the extended time at the same rate.

**Same: bona fide PURCHASER.** Where it appears from the note itself  
3 that time of payment has been extended, it can not be said to have been dishonored because not paid at the original date of maturity; and a purchaser thereof for value, before final maturity and without notice, is entitled to the proceeds as against an attaching creditor of the payee.

*Appeal from Story District Court.*—HON. C. G. LEE,  
Judge.

TUESDAY, MARCH 16, 1909.

ACTION at law upon a promissory note, aided by an attachment under which A. C. Enfield and his wife were garnished as debtors of Clara M. Young. The State Bank of Maxwell intervened, claiming that it was entitled to the money due from the garnishees. The case was tried to the court, resulting in a judgment for the garnishee and intervener, and plaintiff appeals.—*Affirmed.*

*Gillispie & Bannister* and *Chantland & Hadley*, for appellant.

*E. H. Addison* and *U. S. Alderman*, for appellees.

DEEMER, J.—Plaintiff brought suit against defendant, Clara M. Young, upon an account for medical services rendered defendant, Clara M. Young, and caused a writ of attachment to issue, which was served by garnishing Mr. and Mrs. A. C. Enfield. The notice of garnishment was served March 24, 1906, and upon that day the garnishees answered that they were indebted to defendant Young in the sum of \$300 upon a promissory note dated February 16, 1903, and due February 16, 1905. Thereafter, and on May 20, 1907, plaintiff filed an amendment to his petition, setting forth the answers made by the garnishees, and averring that the note referred to therein had

been assigned to the State Bank of Maxwell on April 19, 1906; that said assignment was without consideration, and was made with intent to delay and defraud the creditors of Clara M. Young; that by reason of his attachment, garnishment, and judgment he acquired a prior lien upon the note and the amount represented thereby; and in another amendment to his petition he pleaded that the State Bank of Maxwell was not a good-faith purchaser or holder of the note for value, in that it purchased the same after maturity. The garnishees answered, admitting the execution of the note to Clara M. Young, and that they were indebted to some one thereon in the sum of \$333; that they did not know to whom the money belonged, and they offered to, and did, pay the amount they admitted they owed, to the clerk of the district court, and asked to be discharged, with costs. The State Bank of Maxwell answered on August 26, 1907, alleging that it purchased the note from Clara M. Young before maturity for value, and without notice of any infirmities or intervening equities, and claimed that it was entitled to the money due. Judgment was obtained by plaintiff against Clara M. Young on September 13, 1907, and, upon the issues tendered by the pleadings heretofore quoted, a judgment was rendered December 30, 1907, in favor of the State Bank of Maxwell, discharging and dismissing the garnishees and taxing the costs to the plaintiff. The plaintiff gave no notice of his intention to appeal until he actually served notice on April 13, 1908. The facts are not seriously in dispute. On February 16, 1903, the garnishees made and executed their note for \$300 to Clara M. Young, or order, due two years after date. On the face of the note is this indorsement written above the date line, and above the written and printed matter constituting the body of the note, "Extended from February 16, 1905, to February 16, 1907." On the back of the note, in addition to other indorsements of interest, are the following: "February 20, 1905, Reed.

Twenty-one Dollars as interest for 1905;" and "3/15,'06, Paid \$21.00 Int. to 2/16,'06." The garnishment was served on the makers March 24, 1906, and the State Bank of Maxwell purchased the note from Clara M. Young May 5, 1906, without notice of the garnishment, paying \$299.50 therefor. It had no notice of the garnishment until four or five months after its purchase. The words "Extended from February 16, 1905, to Feby. 16, 1907," were on the note when the bank purchased it, and its officers believed that it had not been dishonored. The testimony shows that A. C. Enfield, on his own motion, and at the request of his wife, went to the payee, Young, on February 20, 1905, and asked her for an extension, at that time paying the interest for one year; that is, down to February 16, 1905. The payee, Young, agreed to extend the note for two years, and the makers, Enfield, promised to keep the money, and to pay the same rate of interest thereon as they had theretofore paid. At the request of Clara M. Young, her step-brother wrote the words of extension heretofore quoted. The bank believed the note had been extended, and there is no doubt that both the makers and the original payee believed that the note had been extended.

I. It will be noticed that appellant's claim is bottomed on an attachment of the amount due on the note by garnishment, and it will also be observed that this attachment

1. ATTACHMENT  
BY GARNISH-  
MENT:  
discharge:  
appeal.

was dissolved by order of the district court, December 30, 1907, and that no notice of intention to appeal was given or filed until April 13, 1908. By section 3931 and 3932, it is provided in substance that, where judgment is rendered against an attaching plaintiff, he must immediately announce his intention to appeal, and must perfect his appeal within two days thereafter, or the discharge of the attachment will be final. These statutes have been construed many times, and the universal holding has been that if a plaintiff fails to follow them he loses all rights under his attachment.

See *Harger v. Spofford*, 44 Iowa, 369; *Ryan v. Heenan*, 76 Iowa, 589; *Farwell v. Tiffany*, 82 Iowa, 405; *Peterson v. Hays*, 85 Iowa, 14. That the same rule applies to attachment by garnishment, see *Peterson* case, last above cited. Whilst the proceeding as finally presented was in the nature of a creditors' bill or equitable levy, nevertheless the attachment or garnishment was the foundation of the action, and, if that be discharged, there is nothing left of the proceedings.

II. Moreover, plaintiff having failed to prove any fraud in the negotiation of the note or any notice to the bank of the garnishment proceedings, the bank is entitled

2. **BILLS AND NOTES:**  
extension of time:  
consideration. to the note and to the proceeds thereof by reason of being a purchaser for value before maturity and without notice. Plaintiff's contention that the note was dishonored before the bank purchased, in that there was no consideration for the extension, is without merit, for that we have recently held that a definite agreement for an extension to a fixed period is valid and based upon a sufficient consideration, although the maker parts with nothing, and agrees to do no more than keep the money for the period of the extension at the same rate of interest. *Lahn v. Koep*, 139 Iowa, 349. So that there was a sufficient consideration for the extension.

But appellant contends that, as the note was once dishonored for failure to pay at maturity, that dishonor could never be purged, although purchased by one who had no notice thereof, but believed from the face of the instrument that it had never been dishonored. His counsel cite, in support of the proposition, *Sagory v. Metropolitan Bank*, 42 La. Ann. 627 (7 South. 633); *Marcal v. Melliet*, 18 La. Ann. 223. Neither of these cases is in point. In the first one, one of the notes showed on its face that the time was not extended until after the note had matured. The other note bore an indorsement extending the time of payment, and

3. **SAME:**  
*bona fide*  
purchaser.

the court said this must be treated as being incorporated into the note, and a part of it, as though that date had been originally written into the note. In *Marcal's* case, the indorsement granting the extension showed that it was not made until nearly a year after it had been dishonored. The court remarked in that case that the only effect of the indorsement was to arrest judicial proceedings for its collection until the arrival of the second stipulated period. In the instant case there was nothing on the face of the instrument to indicate that it had ever been dishonored. On the contrary, it appeared therefrom that by reason of the extension of time it had not matured when the bank purchased it. The bank therefore was an innocent purchaser, before maturity, for value, and the trial court did not err in discharging the garnishees.

The judgment must be, and it is, *affirmed*.

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ESTHER RANKIN, Appellee, v. HERMAN L. SCHULTZ and  
H. C. SCHULTZ, Appellants.

**Fraudulent conveyances: NOTICE TO CREDITORS: BURDEN OF PROOF:**

- 1 EVIDENCE. No transfer of personal property where the vendor retains the actual possession is valid, as against existing creditors without notice, except by a written instrument signed, acknowledged and recorded as provided by Code, section 2906: and the burden of proving actual notice to creditors is upon those claiming by virtue of the alleged transfer. Evidence held to show that a claimed transfer of a stock of drugs by a son to his father, in satisfaction of a mortgage indebtedness, was with the intent to hinder and delay plaintiff in the enforcement of a claim for injuries resulting from a careless sale of drugs.

**Same: ACTION TO ENFORCE JUDGMENT: EQUITABLE LIEN. The com-**

- 2 mencement of an equitable action to subject property to the satisfaction of a judgment, and service of notice with a copy of the petition on the person holding or controlling the property, creates a lien which is sufficient basis for an application of Code, section 2906, relating to the transfer of personal property.



**Same: ELECTION OF REMEDIES.** A judgment plaintiff is not confined in  
3 the enforcement of the judgment to the legal remedy of levying  
an execution upon property subject to a mortgage, but may  
challenge both the mortgage and a pretended transfer of the  
property, if he so elects, by an equitable action under the statute;  
and in bringing such action is not required to give bond.

**Same: APPOINTMENT OF RECEIVER.** Where it appeared that the judg-  
4 ment defendant was insolvent, that he had attempted a fraudulent  
transfer of the stock of goods to his father, of which he was in  
possession and upon which plaintiff had a lien, and that both  
he and his father were drawing money from the business, the  
appointment of a receiver in an action to subject the property  
to the judgment was proper.

**Same: PRIOR LIENS: APPLICATION OF PAYMENTS.** Where a son gave  
5 his father a mortgage upon his stock of goods and thereafter sold  
the stock to him in satisfaction of the mortgage, retaining, how-  
ever, the possession and management of the business, upon the  
setting aside of the sale at the suit of a judgment creditor of  
the son, the amounts drawn from the business by the son while  
in possession for his father, as contended, were properly credited  
by the court on the mortgage indebtedness, in the absence of  
proof that they were used for any other purpose.

*Appeal from Wright District Court.*—HON. C. G. LEE,  
Judge.

MONDAY, NOVEMBER 23, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

SUIT in equity to subject certain personal property to  
the payment of a judgment held by plaintiff against Her-  
man L. Schultz, to set aside a mortgage upon said goods  
held by H. C. Schultz, for the appointment of a receiver,  
and for other equitable relief. The trial court refused to  
set aside the mortgage, but directed a sale of the property,  
and out of the proceeds ordered the receiver to first pay  
the amount found due on the mortgage, and the remainder  
upon plaintiff's judgment. Defendants appeal.—*Affirmed.*

*J. H. Scales*, for appellants.

*Nagle & Nagle and R. W. Birdsall, for appellee.*

DEEMER, J.—The action is a creditor's bill, or rather an equitable levy upon a drug stock in the town of Belmond to subject the same to the payment of a judgment held by plaintiff against defendant Herman L. Schultz. It appears from the testimony that defendant, Herman L. Schultz, acquired a one-half interest in a certain drug stock and business in the town of Belmond some time in the year 1904. At that time the stock was invoiced at something like \$7,800. In December of the year 1905 this defendant purchased the half interest owned by his partner Kenefick, and thenceforth, and until September 28, 1906, conducted the business in his own name. Some time in May, 1906, plaintiff applied to defendant Herman Schultz for some spirits of camphor, and by mistake this defendant gave her carbolic acid instead. Not knowing of the error, plaintiff used the acid with disastrous results. She commenced suit for damages early in September of the year 1906, but defendant Herman Schultz was made aware of her injuries shortly after they were received. Judgment was rendered in plaintiff's favor for the sum of \$1,500 on December 20, 1906. Herman L. Schultz is a son of H. C. Schultz, and it appears that the father furnished most of the money for the purchase of the drug stock, taking the son's notes therefor, one for \$3,895, dated September 21, 1904, which it is claimed was paid by other notes dated August 20, 1906, one for \$1,000, one for \$900, and another for \$3,000. These latter notes were secured by a chattel mortgage upon the drug stock and business under date August 20, 1906. The last-mentioned notes matured November 1, 1906, May 1, 1909, and January 1, 1908. The chattel mortgage was duly recorded. Afterward, and on Sept. 28, 1908, defendants, father and son, entered into a written agreement by the terms of which Herman L. sold and transferred the business and

stock of drugs to his father, H. C. Schultz, in payment of the notes and chattel mortgage aforesaid. This agreement also provided that:

In consideration of a sale and transfer of the stock of drugs and the drug business at Belmond, Iowa, by H. L. Schultz to H. C. Schultz in virtue and in satisfaction of a chattel mortgage thereon executed by the said H. L. Schultz to the said H. C. Schultz, it is agreed by the parties hereto, that the said H. L. Schultz shall clerk for and manage said drug stock business at Belmond, Iowa, for and on behalf of the said H. C. Schultz and in his name and buy stock when instructed to do so, to replenish said stock of drugs, and account to said H. C. Schultz for any and all sales made and moneys received, and render an accurate account of such business to said H. C. Schultz showing the aggregate receipts and disbursements, at the end of every quarter—three months period—or monthly when required. He shall conduct the said business carefully and avoid any liability to the said H. C. Schultz for or on account of the conduct of said business, which he hereby agrees to indemnify him against. The said H. L. Schultz may, with the consent of the said H. C. Schultz, employ a competent clerk to aid him in the conduct of said business whose salary or compensation shall be paid from the receipts of said business. It is further agreed between the parties hereto that the said H. L. Schultz shall receive as compensation for his services as proprietary manager of said business one-third of the net proceeds after deducting all expenses and liabilities thereof, to be paid to him at the period of accounting to the said H. C. Schultz, as required herein.

It was never recorded and no actual physical change was made in the possession of the goods at any time thereafter. From the time the agreement was made the business was conducted in the name of H. C. Schultz & Co., Herman L. Schultz being, as he said, the company. It is claimed by defendant that the business was so conducted in order to save a permit issued to Herman L. There was, as we have said, no actual or visible change made in the possession

or the goods or in the conduct of the business, although there was a change in the name of the firm, as above indicated. Plaintiff commenced this action on December 26, 1906, the petition being filed December 27 and the original notice being served upon H. C. Schultz on January 5, 1907.

It appears that since January 1, 1907, defendant Herman Schultz has drawn out of the business something like \$556, and that since the making of the contract of sale H. C. Schultz has drawn out \$1,088. The trial court held the mortgage to H. C. Schultz valid, but decreed the sale fraudulent and void. It also made an accounting of the amount due on the mortgage indebtedness, finding it to be \$3,391.28, with 6 per cent. interest from May 1, 1907, declared this to be a first lien upon the goods, established a second lien on the goods in plaintiff's favor to the amount of her judgment with interest, appointed a receiver, and directed a sale of the goods to pay these liens. Plaintiff did not appeal; but defendants did, and are here challenging the correctness of the decree in so far as it is adverse to them. In view of this record we can not do more for plaintiff than affirm the judgment. Defendants' appeal, however, presents for our consideration several propositions which we shall consider in the order in which they are discussed in counsel's brief.

It is contended that the sale of the drug stock and business was and is valid, and should have been sustained. The trial court found it to be fraudulent, in that it was

made with intent to hinder, delay and defraud creditors, and counsel also contend that it was fraudulent because the instrument was not recorded, and no visible and outward change was made in the possession. To meet this last proposition it is contended for appellants that no such issue was raised by the pleadings. This is a mistake, however. The pleadings do tender this exact issue.

1. FRAUDULENT  
CONVEYANCES:  
notice to  
creditors:  
burden of  
proof:  
evidence.

But, aside from this, we think the trial court was justified in finding the transaction fraudulent, in that it was an attempt to hinder or defeat the plaintiff in the collection of her claim. The notes had none of them matured when the pretended sale was made. If it were a sale, no reason is given for transforming a mortgage into a sale so short a time after it was given, and at a time when no other necessity appears, save that plaintiff was likely to obtain judgment in her suit already commenced. For some reason the chattel mortgage was not recorded until September 20, and the secret transfer of the goods was made within eight days thereafter. No notice was given to any one of this transfer, and no one save the parties seem to have had any knowledge thereof until about the time of the trial of this case in the district court. By section 2906 of the Code it is provided that no sale of personal property, where the vendor retains actual possession, is valid, against existing creditors without notice, unless a written instrument conveying the same is executed, acknowledged, and filed for record with the recorder of the county. This statute seems to be very plain, and has many times been construed by this court. See *McAfee v. Busby*, 69 Iowa, 328; *King v. Wallace*, 78 Iowa, 221; *Martin v. Lesan*, 129 Iowa, 573; *Peycke v. Hazen*, 119 Iowa, 641. There is no claim that plaintiff had any notice of the alleged transfer, and the burden was upon defendants to show that fact if it existed. *Martin v. Lesan*, *supra*.

Appellants cite some cases, most of which were decided under section 2925 of the Code, relating to sales of real estate which are manifestly not in point. In this connection it is argued that plaintiff did not acquire a lien upon the property before notice of the sale, and that she can not take advantage of the statute. But this is not true. An execution was levied upon the stock before any notice was brought home to plaintiff of the alleged sale. More-

2. SAME:  
action to  
enforce  
judgment:  
equitable lien.

over, even if this were not the case, this action itself constituted an equitable levy, and was fully justified under sections 4087 and 4089 of the Code. The latter section provides that a lien shall be created from the time of the service of a notice and copy of the petition on the defendant holding or controlling the property. This is what is known as an equitable levy; and, when made, it is sufficient basis for the application of section 2906. Such proceedings as this have heretofore been recognized in this court. *Hirsch v. Israel*, 106 Iowa, 498; *McKee v. Murphy*, 138 Iowa, 322.

Defendants contend that plaintiff had a full, speedy, and adequate remedy at law, under sections 3979 *et seq.*, providing for levies of execution upon mortgaged property, and insist that an action in equity will not lie, and that in any event the trial court should have required a bond from her, as provided in section 3988. We regard these statutes as cumulative, and that it was for plaintiff to elect her remedy. She might prefer to challenge both the mortgage and the sale by equitable proceedings, under section 4087 *et seq.*, or by equitable levy rather than by proceedings under the statutes with reference to levies upon mortgaged property. She evidently did so elect, and there is no provision of law requiring her to give bond in such cases. See, as supporting these views, *O'Brien v. Stambach*, 101 Iowa, 40; *Welch v. Burdick*, 101 Iowa, 70.

Again it is contended that it was error for the court to appoint a receiver. The testimony shows that Herman L. Schultz is insolvent; that he has at all times been in possession of the goods; that since the commencement of this suit he has drawn a considerable amount from the business; that the father also drew out money on the day the notice was served upon the son. The pretended sale by son to father was manifestly fraudulent; and, plaintiff's lien having

3. SAME:  
election of  
remedies.

4. SAME:  
appointment  
of receiver.

been established, it was necessary that the goods be sold by someone in order to satisfy this lien. That could best be accomplished by a receiver, and there was no error in the decree providing for the appointment of such an officer. The receiver was ordered to give bond, and of this no complaint is made. By turning again to the statutes under which this proceeding was instituted, it will be observed that they make no provision for a bond pending the litigation. Possession of the property is not disturbed in such cases, and no bond seems to be necessary until the property is placed in the hands of a receiver. When the character of the proceeding is once determined to be an equitable levy, as must be the case here, the questions presented are not difficult of solution.

Something is said regarding the credits which the trial court found should be made upon the mortgage indebtedness. There is no doubt about the amounts stated having been withdrawn from the business; but defendants insist that, in so far as they were drawn out by Herman Schultz, they did no more than maintain the business, and were thought the necessary expenses of keeping it going. This, though, has no other foundation than surmise. It is not supported by any testimony; and, in the absence of proof, the amount so drawn while Herman was in possession, as he says, for his father, should be credited on the indebtedness. It was his duty to do this, and we must, in the absence of proof, presume that he did his duty. As plaintiff did not appeal, we can not modify the decree in her favor. Defendants suffered no prejudice from the order allowing credits.

We have gone over the record with care, and discover no error. The decree is therefore *affirmed*.

5. SAME:  
prior liens:  
application  
of payments.

M. A. McDIVITT, Administrator, Appellant, v. DES  
MOINES CITY RAILWAY COMPANY, Appellee.

**Instructions:** STATEMENT OF ISSUES. Where the issues are simple  
1 and the pleadings concise it is not prejudicial for the court to  
state the issues in the language of the pleader, although this  
practice has in some cases been criticised and condemned. But  
where it is adopted as preliminary to a statement of the issues  
withdrawn and of those to be submitted, it may result in clear-  
ness, especially where counsel in their opening statements have  
referred to all the issues as made by the pleadings, and there  
has been evidence received respecting all.

**Instructions:** AMBIGUITY: CONTRADICTION: WHEN NOT CURED BY OTHER  
2 INSTRUCTIONS. An ambiguous instruction, or one which standing  
alone is erroneous because of some omission, may be cured by  
another paragraph of the charge which is clear on the omitted  
or ambiguous point; but an affirmatively erroneous instruction,  
free from ambiguity, can not be cured by a correct statement of  
the point in another paragraph: as where the court charged that  
if the jury failed to find that decedent was not guilty of negli-  
gence contributing to her injury, the verdict must be for de-  
fendant, and in another paragraph told the jury that the decedent  
was guilty of contributory negligence, the instructions presented  
a direct contradiction which was not cured by the further state-  
ment that there might be a recovery notwithstanding decedent's  
contributory negligence.

**Instructions:** STATEMENT OF ISSUES. Where the court in stating the  
3 issues set forth all the grounds of negligence alleged in the peti-  
tion, a portion of which only were to be considered by the jury, it  
should have embraced in the same connection a concise state-  
ment of those questions which the jury was to determine;  
and a failure to do so until after instructions upon other matters  
was not a proper statement of the issues and was prejudicial.

**Street railways:** RIGHTS OF PUBLIC. The relation of a street car com-  
4 pany to the traveling public is not affected by the fact that it  
owns the fee to its right of way, where its patronage is dependent  
upon its relation to the street and it maintains a platform partly  
in the street for the accommodation of the traveling public.

**Same:** NEGLIGENCE. The crossing of a street car track in front of an  
5 approaching car is not *per se* a negligent act; the question of



negligence in such cases depends upon the particular circumstances, as the distance from the approaching car and its speed.

**Same: WHEN A FACT QUESTION.** Where there is evidence tending to 6 show that at the time a pedestrian attempted to cross a street car track in front of an approaching car, he had reason to believe he could cross in safety but his failure to do so was the result of excessive speed of the car, reasonable minds might differ on the question of his negligence and a fact question is presented.

**Same: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** The question of whether 7 decedent, killed in a collision with a street car while attempting to cross the track, was guilty of contributory negligence is held under the evidence to have been for the jury.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

MONDAY, NOVEMBER 23, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

ACTION for damages for personal injuries to plaintiff's intestate, resulting in her death. Verdict and judgment for the defendant. Plaintiff appeals.—*Reversed.*

*Parrish & Dowell*, for appellant.

*R. B. Alberson and Carr, Hewitt, Parker & Wright*, for appellee.

EVANS, J.—The accident in question occurred on July 15, 1905, on Ingersoll Avenue, in Des Moines. Ingersoll Avenue runs east and west at the point of the accident. The defendant owns the fee of the right of way on which it operates its street car line. On each side of this right of way is laid out a public street, forty feet in width. These two streets and defendant's right of way between constitute Ingersoll Avenue, for all practical purposes. A narrow street, known as "Crescent Drive," intersects this

avenue practically at right angles. Near the west line of Crescent Drive and on the south line of its right of way, the defendant maintained a platform for the accommodation of passengers. This platform was partly upon the right of way and partly upon the street proper. The deceased lived a short distance to the northeast of this platform, and was in the daily habit of taking the east-bound car for the city every forenoon. There were two tracks upon the right of way; the north one being used for west-bound cars, and the south one being used for the east-bound cars. On the morning in question, the deceased started in the direction of the platform, traveling south and west. While she was traveling west on the street along the north side of the right of way, and before she reached a point opposite the platform, she was overtaken by a west-bound car, which passed her, obstructing for a few moments her view of the south track. Immediately behind such car, she crossed the north track and started to cross the south track, she was struck by the east-bound car, while crossing such track, and received injuries from which she afterwards died.

One witness fixed the point of the accident as five to ten feet east of the platform. Others fixed it at a greater distance. Before the view of the deceased was obstructed by the west-bound car, the east-bound car had come into view at some distance away. One witness, who was a passenger on the west-bound car, testified that when the deceased passed behind that car the east-bound car must have been from seventy-five to one hundred, and possibly one hundred and fifty feet away. The distance between the two car tracks was about five feet. There is evidence tending to show that the east-bound car was traveling at a rate of twenty-five miles an hour; whereas, the ordinance permitted no greater speed than twelve miles an hour. There was also evidence tending to show that the plaintiff was carried on the fender for some distance before the car

was stopped, and that the car was started a second time after it had been once stopped, and after the deceased had been thrown from the fender, and that the deceased received her fatal injuries as the result of the second starting of the car. Plaintiff's petition averred negligence in twelve specifications consecutively numbered. Six of them charged negligence prior to the collision, consisting mainly of the alleged reckless speed and failure to have the car under control, and the other six charged negligence occurring after the collision, consisting mainly in the alleged failure of the motorman to stop the car as soon as he might have done, after discovering the peril of the deceased, and also in permitting the car to start after it had been stopped. The answer was a general denial and a plea of contributory negligence.

I. After hearing the evidence, it was the opinion of the trial court that the deceased was guilty of contributory negligence, and that she could not recover on that account, except for negligence occurring after she was struck, upon the theory of the "last clear chance," and he aimed to instruct the jury to that effect. Assuming, for the time being, that the court was right on the question of contributory negligence, the appellant complains of the instructions as given. It is complained, first, that the issues were not properly stated, in that the trial judge embodied in his statement of the issues a copy of the pleadings, and in that he included therein issues which were not to be submitted for their consideration. Under the heading "Statement of the Issues," which was the first statement read to the jury, and which preceded the numbered instructions, the court did state the issues by setting forth a substantial copy of the petition and answer. The practice of copying pleadings as a statement of issues has been often criticised and condemned by this court. *Swanson v. Allen*, 108 Iowa, 419, and cases there cited. But where the issues are simple,

1. INSTRUCTIONS:  
statement  
of issues.

and the pleadings are concise, it has been held not prejudicial for the court to state the issues in the language of the pleader. *Little v. McGuire*, 43 Iowa, 447; *Crawford v. Nolan*, 72 Iowa, 673. The petition in the case at bar was concise, and the language used therein might well be resorted to by the court, without prejudice to the plaintiff. The greatest difficulty appearing here is that the issues, as so stated, included the twelve specifications of negligence; whereas, the court was about to withdraw from the consideration of the jury six of those specifications. It is not, however, wholly unreasonable that the court should state to the jury what the issues were as made by the pleadings, as preliminary to a statement of what issues are withdrawn from their consideration and what issues are left for their consideration. This method may result in clearness to the mind of the jurors as to what things are eliminated, and what things remain. This is especially true if, in their opening statements to the jury, counsel have stated the issues as made by the pleadings, and if on the trial evidence has been received or offered in support or rebuttal of all such issues. It may often serve to clear away confusion in the mind of the jury therefore to set forth: (1) The issues made by the pleadings; (2) that part of those issues determined by the court; (3) the issues remaining for the consideration of the jury. We think therefore that in this case the plaintiff has no ground of complaint from the mere fact that the court followed the language of his petition in stating the issues to the jury. The failure of the court, however, to properly follow up this statement, will be considered later.

II. The appellant complains further

2. INSTRUCTIONS: that the instructions of the court were contradictory, and that, although the court held the deceased to have been guilty of contributory negligence, it nevertheless laid up on the plaintiff the burden of proving freedom from con-

ambiguity:  
contradiction:  
when not  
cured by  
other  
instructions.

tributory negligence before she could recover even upon the theory of the "last clear chance."

After a statement of the issues, the court presented its instructions in paragraphs numbered from 1 to 19, inclusive. The first six are as follows:

(1) The burden of proof is upon plaintiff to establish by preponderance of the evidence each of the following propositions: First, that the deceased, Edith McDivitt Lawson, was struck and injured by the defendant's car about the time, at the place, and substantially in the manner alleged in plaintiff's petition; second, that said decedent was not guilty of negligence causing or contributing to her said injury; third, that the defendant was guilty of negligence substantially as alleged by plaintiff and hereafter in these instructions more fully specified; fourth, that said injuries so received by decedent were the direct and approximate result of the negligence of the defendant; fifth, that the estate of decedent has been damaged in some amount thereby. If you find affirmatively as to each and all of the above propositions, then your verdict will be for the plaintiff. If you fail to find affirmatively as to any one of the above propositions, your verdict will be for the defendant.

(2) As has been stated in the previous instruction, the burden of proof is upon the plaintiff, and before she can recover she must establish by a preponderance of the evidence that the defendant was guilty of one or more of the particular acts of negligence charged in the plaintiff's petition, and that such negligence was the proximate and direct cause of the injury which the plaintiff claims to have sustained on account of the injury and death of decedent. In determining whether the defendant was or was not guilty of the negligence complained of as alleged in plaintiff's petition, you will consider only the negligence alleged pertaining to the stopping or movement of the car in question, after decedent was seen by the motorman in a place of danger, and whether such negligence was the proximate cause of the injury resulting in the death of decedent.

(3) An accident may happen and an injury ensue thereby without any negligence on the part of any one connected therewith. If you find from the evidence that the

injury and death of decedent was the result of mere accident or misadventure, and that the same occurred without any fault, negligence, or failure on the part of the defendant company or its employees to exercise reasonable care and caution in the discharge of its duty in the operation of its car, then the plaintiff can not recover, and your verdict will be for the defendant.

(4) The undisputed evidence in this case shows that the deceased approached the railway track of defendant, and, after having so approached the railway track of defendant, waited for the west-bound car to pass her, and that, after such car had passed, decedent immediately proceeded across the north track, and the intervening space of almost five feet between the north and south tracks, and stopped in front of an east-bound car on the south track, there passing, and was struck by said car without taking any precautions to avoid the accident. You are instructed as a matter of law that this action of decedent would constitute negligence, and plaintiff can not recover unless you find as hereinafter instructed. The only question therefore which you have submitted to you for consideration is whether or not the defendant's employees in charge of the east-bound car, which came in contact with the deceased, were guilty of the negligence charged in failing to avoid the injury which resulted in the death of decedent after the deceased stepped from behind the west-bound car and onto the south track of defendant, and she was seen by the motorman in a position of danger. In this connection the only allegations of negligence which you will consider are:

(5) In relation to the care required of the defendant company, you will only hold it to the exercise of reasonable care, which consists in doing everything which a person of ordinary care and prudence would do, and omitting to do everything which a person of like care and prudence would omit to do. Negligence is defined to be the omitting to do something that a reasonably prudent person would do, or the doing of something which such a person would not do. Under the circumstances of this case, if you find from the evidence that the defendant, by its employees, omitted to do something that a reasonably careful and prudent person would do, or did something that such a person would not do, as to the movements or stopping

of said car after decedent was seen by the motorman to be in a place of danger, you would be warranted in finding the defendant guilty of negligence; and, if you so find, and if you also further find that such negligence was the proximate cause of the injury and death of the decedent, your verdict will be for the plaintiff. If, on the other hand, you find that the motorman, Lewis, in operating the car in question which caused the injury and death of the decedent, did everything which a reasonably prudent person would have done at the time of the accident in stopping the car in question, then you would be warranted in finding that the defendant was not guilty of negligence, and, if you so find, your verdict should be for the defendant.

(6) You have been heretofore instructed, gentlemen, that the decedent was negligent in going upon the track in front of the east-bound car, which struck her; but you are further instructed that, while the law holds that plaintiff can not recover on account of the contributory negligence of decedent in stepping in front of the east-bound car in the manner in which she did, yet if, after the motorman saw her in a place of danger or about to step upon the track in front of the approaching car, he negligently failed to stop said car within a reasonable time or distance under the circumstances shown by the testimony, and such failure was the direct and proximate cause of the injury which resulted in the death of decedent, then your verdict will be for the plaintiff.

From an examination of instruction 1, it will be observed that the jury was instructed, expressly, that, if it failed to find that the decedent was not guilty of contributory negligence, the verdict must be for the defendant. Instructions 4 and 6 expressly stated to the jury that the decedent was guilty of contributory negligence. This presents the alleged contradiction of which appellant complains. It is contended by appellee that instructions 4 and 6 expressly state to the jury that the plaintiff may recover notwithstanding contributory negligence, and this contention is correct; but this does not eliminate the contradiction in the instructions. Appellee contends that the

instructions must be considered as a whole, and this is true. It is argued, also, that the error in the first instruction is cured by the statement in the fourth and sixth; but it is cured only in the form of a contradiction. Our previous cases cited by appellee are not in point. It has been held that where an instruction is ambiguous, or where, standing alone, it is erroneous because of some omission, it may be cured by other instructions that are clear upon the omitted or ambiguous point; but where an instruction is free from ambiguity, and is affirmatively erroneous, the error is not cured by a contradiction contained in another instruction. There is no way in such case to determine which instruction the jury may follow. The question presented in this case is almost parallel with *Christy v. City Railway Company*, 126 Iowa, 428, and the cases therein cited. The error in this case was somewhat emphasized by the sixteenth instruction, which contains the following: "Contributory negligence is such negligence as contributes to an injury"—a definition which was quite unnecessary in view of the withdrawal of the question from the consideration of the jury. The natural effect of it would be to impress the jury that the question was still in the case, and to emphasize the error contained in instruction 1.

III. Reverting now to the point considered in first division of this opinion, if the court had followed its "Statement of Issues" with instruction No. 4, and had omitted instructions Nos. 1, 2 and 3, it would have rendered the instruction quite unassailable in the respect complained of.

3. INSTRUCTIONS:  
statement  
of issues.

After stating to the jury twelve specifications of negligence, a few only of which were to be submitted, it behooved the court to be prompt in directing the attention of the jury to the very issues to be submitted. By failure of the court to do this, it left the jury for the time being without any light as to what was to be submitted for its



consideration, or else left the impression that all the stated issues were to be submitted. That part of the instructions denominated "Statement of Issues" was an incomplete statement. It recited the issues made by the pleadings, but it did not advise the jury which of such recited issues were to be submitted to it. The first singling out of the issues to be so submitted occurred in instruction No. 4. This instruction should have been included in the "Statement of Issues," or else it should have immediately followed it. Instructions Nos. 1, 2 and 3, were not only unnecessary and in part erroneous, but they were seriously out of place, in that they were interjected into the subject of stating the issues. The natural effect of such interjecting was to leave the impression on the minds of the jurors that all the issues previously stated were to be submitted to them. For this reason it must be said that the issues were not properly stated, and that the failure was prejudicial to the plaintiff.

IV. Appellant complains of the ruling of the lower court in holding the decedent to have been guilty of contributory negligence. To our minds, this question is a close one.

If this were a case involving a steam railroad, we would not hesitate to hold with the trial court. It is urged by appellee that the defendant in this case should stand in the same position as a steam railroad, because it was the owner of the fee of its right of way, and in that sense was not using the public street. We are not able to see that that fact changes the relation of the defendant to the traveling public or protects it against the ordinary rules of liability. Appellee cites no authorities in support of its position in this regard. To our minds, the practical effect as between the defendant and the traveling public is the same, whether the defendant owns its fee or not. Its right of way is a part of the plan of the avenue. Its patronage is dependent upon its relation to the avenue. It maintains a plat-

4. STREET RAIL-  
WAYS: rights  
of public.

form upon one side of its right of way and partly upon the street for the accommodation of its passengers. It necessarily invites pedestrians to cross its right of way from one side of the street to the other. This was true in this particular case. The decedent was a patron living on the north side of the track. She must necessarily cross the track in order to get to the platform on the south side. She was crossing within a few feet of the platform at the time of the accident.

It will not do to say that the act of crossing a street car track in front of an oncoming street car is *per se* negligence. Such tracks are necessarily so crossed daily by thousands of people. Whether it be negligence as a matter of fact, or law, must depend upon the circumstances of the given case. One of the important circumstances is the distance of the oncoming car, and another is its speed. The distance can always be estimated with sufficient accuracy for the purposes of prudence. The speed, however, may be deceptive. A pedestrian would doubtless be charged with knowledge of the speed permitted by ordinance. One might see an oncoming car so far away that he might prudently believe that he could safely cross the track, and yet the speed of the car might be so excessive as to overtake him before he had cleared to a place of safety.

In the case at bar, if it must be assumed from the testimony that the decedent stepped in front of a moving car that was already upon her, then the action of the court was right; but if there is evidence tending to show that at the time the decedent entered into the danger zone the car was at such a distance from her that she might reasonably believe that she could cross in safety, and if her failure to do so was the result of the excessive speed of the car, then reasonable minds might differ as to whether she was negligent, even though all might agree that she did not evince the highest

5. SAME:  
negligence.

6. SAME: when  
a fact  
question.

degree of caution. As already indicated in the preliminary statement of the facts, the witness Cleland testified that, when the decedent passed behind the west-bound car, the east-bound car must have been from seventy-five to one hundred, and possibly one hundred and fifty feet west of her. Assuming this statement to be true, can it be said, as a matter of law, that it is *per se* negligence to cross a street car track ahead of an oncoming car seventy-five feet or one hundred feet distant? The statement of this witness is not inconsistent with the physical possibilities. If the car were traveling at twelve miles an hour, the decedent would ordinarily walk eighteen feet while the car traveled seventy-two feet. This would have given her a margin of safety. If the car were traveling at twenty-five miles per hour, the decedent could walk only nine feet, and this would be within the danger zone. Of course, if the speed of the car was manifest to a person standing where the decedent stood, she would be chargeable with knowledge of it, and chargeable with negligence if she ventured to cross under such circumstances; but that, also, is a question for the jury.

It is urged by appellee that this case comes within the rule of *Ames v. Waterloo Transit Company*, 120 Iowa, 640. We think, however, that it comes within the rule of

the cases cited and distinguished in the opinion in the *Ames* case. *Patterson v. Townsend*, 91 Iowa, 725, is quite in point.

The fact that both the decedent and the car were approaching the platform where the car would presumably stop, and that the decedent was crossing the track east of the platform, is a circumstance to be taken into consideration in determining whether she acted as a reasonably prudent person might. Cleland testified that the west-bound car had gone fifty or sixty feet west of the point of the accident when it occurred. This would indicate that the east-bound car was moving more rapidly than the west-bound

7. SAME:  
contributory  
negligence:  
evidence.

car, assuming Cleland's estimates of distances to be correct. If the east-bound car was seventy-five feet distant when the decedent emerged from behind the west-bound car, it was west of the platform. If the motorman saw the decedent, and had reason to believe that she was going to the platform, he was confronted with a double duty to stop his car—to stop it for the purpose of taking on a passenger, and to stop it for the purpose of avoiding a collision. In this discussion, we are, of course, considering the evidence in the most favorable light for the plaintiff. We do not overlook the fact that there is testimony in the record which, if taken as true, would sustain the action of the lower court; but we have nothing to do with the weight of the evidence. That question is for the jury.

Our opinion is that, on the whole record, there is sufficient evidence to go to the jury on the question of contributory negligence.

The judgment below is reversed, and cause remanded for a new trial.—*Reversed.*

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WILBUR M. MILLER, Appellant, v. WHITE BRONZE MONUMENT Co., Appellee.

**Master and servant: SAFE PLACE TO WORK: ASSUMPTION OF RISK:**

1 EVIDENCE. In an action to recover for personal injuries to plaintiff while employed in a building, the question of the employer's negligence in failing to provide plaintiff a safe place to work by repairing the floor of the building, and the plaintiff's assumption of the risk by continuing in the employment after a promise to repair, are held under the evidence to have been for the jury.

**Same: PROMISE TO REPAIR DEFECTS.** An employee who continues to

2 work in a building with knowledge that the floor of the room is unsafe assumes the risk incident thereto, unless he objects to the unsafety of the place and remains under a promise of repair, in which event he does not assume the risk during a reasonable time for the master to make the repairs; unless, of course, the hazard is so great that a person of ordinary care knowing the same

would not continue the service. What is a reasonable time to remain in the service after a promise of repair, and whether an employee is justified in remaining even upon such promise, are ordinarily questions for the jury.

**Same: DUTY OF SERVANT TO REPAIR.** A servant who is not employed to  
3 do carpenter work is under no obligation to repair an unsafe place in the building in which he is engaged; and even if he was he is relieved of the duty by an order of his superior directing him not to make the repairs, so that his failure to do so is not negligence.

**Contributory negligence: EVIDENCE.** It is the duty of an employee to  
4 exercise reasonable care for his own safety, and if he knows, or by the exercise of reasonable care should have known of a defect in the floor of a building in which he was employed, and of its dangers, his temporary forgetfulness of the dangerous situation is not an excuse for failure to exercise such care. Evidence held to show plaintiff guilty of contributory negligence in stepping into a hole in the floor of the building in which he was at work.

**Assumption of risk: CONTRIBUTORY NEGLIGENCE: EVIDENCE: DISTINC-**  
5 **TION.** Assumption of risk is a waiver of defects or dangers and consent on the part of an employee to assume them regardless of the exercise of care on his part, and is a matter of contract, while contributory negligence grows out of the conduct of an employee and is not based upon any contract relation.

*Appeal from Polk District Court.*—HON. W. H.  
McHENRY, Judge.

TUESDAY, NOVEMBER 24, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

ACTION at law to recover damages for injuries received by plaintiff while in defendant's employ. The defenses were assumption of risk, contributory negligence, and a claim that the defect which resulted in the injury was one of plaintiff's own making, which it was his duty to discover and repair. At the conclusion of plaintiff's evidence, a verdict was directed for defendant, and plaintiff appeals.—*Affirmed.*

*Spurrier, Mills & Perry*, for appellant.

*C. W. Johnston and J. D. Wallingford*, for appellee.

DEEMER, J.—It is charged in the petition that defendant was negligent in not furnishing plaintiff a reasonably safe place to work, in not furnishing him proper tools and appliances with which to work, in not discovering and repairing a defect in the floor of its plant in which plaintiff was employed, in failing to notify plaintiff of the dangerous condition of the floor, and in requiring plaintiff to work in a dark and dimly lighted room, which had a defective floor, without informing him of the dangers incident thereto. The defenses have already been stated. In passing upon the questions involved on this appeal, we must take that view of the testimony most favorable to plaintiff, for the case was disposed of on defendant's motion for a directed verdict. At the time of the accident plaintiff was twenty-nine years of age. He had worked for defendant at odd times for a period of four years. Just before his injury he had been in defendant's employ about six weeks. He was employed about the manufacture of what are called "white bronze monuments," and on the occasion of his injury was doing what is known as "sticking and pouring," with the promise that as soon as the work was brought up he should do the "lettering" on the monuments. One Groth, a foreman of the defendant, employed the plaintiff, and he was succeeded in the foremanship by one Topliff. The room in which plaintiff worked was a large one, the exact size of which does not appear in the record; but it was more than one hundred feet one way by sixty or more the other. There are windows in the south and west ends of the building eight by three and one-half feet, but some of them were dirty and cut off by a cheese cloth, which obstructed about one-third of the light. Near the west end

of the building were two benches upon which plaintiff did his work. About thirty-five feet from the west end of the building, there was a forge in which zinc was melted, and near one of the tables or benches was a small stove or soldering pot where solder and soldering irons were heated. About these tables, stoves and forges plaintiff was at work "sticking and pouring;" that is to say, sticking the various parts of the metal monuments together and joining them with solder. Plaintiff's account of how the accident occurred is as follows:

When I was injured I was working at the tinning bench tinning some castings. We had a large piece about, I don't really know the exact size of it, but it was about five feet by four, about that high (indicating), like a frame, and had already poured that. That was to be the bottom of a monument, and there was another part to go on top of it. Those pieces had been taken up to the finisher's bench. We finished them there first; done the filling on them and smoothing them, and Mr. Topliff, the foreman, took this piece I was on when I got hurt. He brought it down and set it down near the fusing bench. He called me then, and we took a sort of chainhack and lifted the top over on it to see how it would fit, and we lifted it off again, and Mr. Topliff told me to go ahead and finish. The fusing bench was about 20 inches from where he had set this piece, and the acid which was used to put on before putting the solder on was sitting on that bench. I went to reach for the acid. I was in a hurry, and the work had been hurrying us up, and I was anxious myself to try to help them out and get orders finished up. I stepped over into the center of that piece and made another step, intending to reach for the acid bottle and turn around and stay inside of it and put the acid around and go out and get my soldering iron, but, instead of stepping on solid floor, as I thought I would, I went into a hole and caught my knee, and went to sort of throw the other leg over at the time I set that foot down, and fell into the hole. My leg went down into the hole and caught me about

I. MASTER AND  
SERVANT:  
safe place  
to work:  
assumption  
of risk:  
evidence.

the knee. The hole was just about wide enough to catch my knee. I fell, and it caught me by the knee.

Plaintiff also testified to the following:

Before my injury I had a talk with the foreman respecting the condition of that place. The first time we talked of the holes in the floor was during the month of May. I can't remember. It was along about the latter part of May. Mr. Topliff was the foreman then. The next time I talked with him was about a week later. I talked with him three times about that. The third time was about—it was during the same week I got hurt, three or four days before I got hurt. I had a big monument I was working on, and I called a couple of the other employees to help me lift it, and when they went to lift it one of the boards cracked, and Mr. Topliff happened to be passing, and I turned around to him and I said: 'John, you will have to get this floor fixed up now before some of us get hurt.' He said: 'All right. I have been intending to fix it all along, but I will fix it as soon as I get time.' I never knew of any custom about every man repairing the floor. I was never required or directed to do any carpentering there. There was a carpenter there that did the carpenter work. I continued to work after I discovered that the floors were defective and that there were holes in the floor, because Mr. Topliff said he was going to fix it. I continued to work, relying on his promise to fix it.

He also testified regarding the condition of the light:

Q. I will ask you if you remember on this afternoon that you were injured what the condition of the interior of that factory was at the place where you were injured with respect to light, whether it was dark, or medium, or how? A. It was very gloomy. Q. What was the general condition of the interior of the factory as to being light or otherwise? A. It is generally rather dark. It wasn't real light. It was light enough, you could see what you were doing and see your work, but it wasn't real light. It wasn't as bright as it is in this room. Q. State whether



or not artificial lights were used in the factory in the daytime. Let me modify the question. State whether or not it was customary among the workmen there on dark days and during the daytime, midday, to use candles or other artificial lights when engaged about their work. A. I have known them to use candles.

On cross-examination the witness stated: That the hole in the floor was about twenty inches south of the bench at which he worked; that there were windows all along the entire south wall of the building and four or five in the west wall of the size hitherto mentioned, that the light from these windows shone all around the room; that the ceiling of the building was something like twelve feet in height; and that there were no partitions in the room in which he worked. It also appeared from his cross-examination that the bench at which plaintiff was working was from twelve to twenty feet from the south wall and at the west end of the room. The accident happened about three o'clock in the afternoon, and on cross-examination the witness gave this account of it:

The hole in the floor was about twenty inches south of the bench I worked at. I stepped over in the center of the base, and went to step over on the other side of it to reach for the acid, and then I stepped in the hole. The base was almost directly south of the hole. The base was about twenty-two inches south of the bench, and the hole was about twenty inches south of the bench. The base was lined right up with the hole. That is the reason I didn't see it. I didn't think of the hole at that time, because I didn't put the work there. I had not been doing my work at that place. I had always been avoiding that place. The bench stood the long distance north and south. I always put the monuments on the bench in the way that would be handiest, a long tall monument lengthwise.

The following testimony shows how the hole came to be in the floor:

Q. Now, Mr. Miller, this hole being about twenty inches south of the bench, what caused the hole in the floor? A. Well, just the natural wear and tear. Q. Sliding these monuments off the bench onto the floor, the point of the base hitting the floor finally cut it through? A. Yes, partly. Q. What else besides that? A. Age, rotten. Q. How big was this hole? A. Oh, I don't know. I never measured the hole. It was big enough for my foot to go in. Q. A small hole then? A. Yes. Q. Four or five inches wide and probably four or five or six inches? A. I should say about that, yes.

This hole was in existence when plaintiff began work for defendant the last time and he testified as follows:

I first called Mr. Topliff's attention to the hole in the floor in the latter part of May, somewhere along about the 23d, 24th or 25th. I again called his attention to the floor in about a week. It was before Decoration Day, about the 28th or 29th. I again called his attention to the floor about three or four days before I got hurt, sometime during the same week. I said: 'John, this floor is in awful bad shape around here. It ought to be repaired. Don't you think I had better fix it up a little?' (Topliff) 'Well, we are too busy now. Go ahead with your work, and I will fix it up myself.' This conversation took place by the forge. He said he would fix it as soon as he got time. At the second and third conversations he said about the same things. Q. And that was in response to a request that you fix it, and he said no, he would, you go ahead with the work and he would fix it when he got time. Is that what was said? A. Yes, sir. Q. What was said at the third conversation? A. Well, that was referring to that big monument. A large monument on the floor—there was one board sort of cracked. It broke, sort of split, and I turned around to Mr. Topliff and said: 'When are you going to fix this floor? It is dangerous. It will have to be fixed.' He said: 'I have been wanting to do that. It seems like I can't get time, but I will fix it up.' Q. Well, he stated the same as he had before, as soon as he got over with the rush he would fix it, did he? A. Yes, sir. The portion of the floor that cracked that day when

the heavy monument was rolled on it was near the place where I was hurt. It was not the same place.

Aside from a little more testimony regarding Topliff's promise to repair the defect in the floor, the effect of which was that no definite time was fixed for the repairs, and that plaintiff expected to quit when his week was out if the floor was not fixed, this is substantially all the testimony material to our inquiry. From this it is manifest that there was ample to take the case to the jury upon the question of defendant's negligence in the respects charged in the petition. This testimony was also sufficient to take the question of assumption of risk to the jury; that is to say, it was a fair question for it to determine whether or not plaintiff was justified in remaining in defendant's employ after the promises of repair were made, and as to whether or not he should have concluded that defendant, through its agents, by reason of the nature of the promises and the time that elapsed after they were made without performance, had concluded not to comply with its promises and make the repairs. This view has support in the following, among other, cases: *Buehner v. Creamery Co.*, 124 Iowa, 445; *Huggard v. Glucose Co.*, 132 Iowa, 724; *Wible v. R. R. Co.*, 109 Iowa, 557; *Foster v. R. R. Co.*, 127 Iowa, 84.

Plaintiff, of course, knew of the defect which caused the injury, and that it had existed during the entire time of his last employment by the defendant. In such circumstances, he will be held to have assumed the risk incident to his employment about this defect, unless it be shown that he protested against the same to a proper officer of the defendant, and was promised that the defect would be repaired. If he made such protest, and was given a promise that it should be repaired, he did not assume the risk until such time had elapsed, without the promise being complied with, as that a person of ordinary care and prudence would understand

2. SAME: promise to repair defects.

that the promise was not to be kept. After the expiration of such time, plaintiff, if he continued in defendant's employ, would in law reassume the hazard, and could not recover for any injuries received by reason of the defect. Of course, if the hazard was so great that a person of ordinary prudence and care would not have assumed it, knowing that continuance in the employment without repairs being made would subject him to imminent danger of life or limb, then he would not be justified in continuing to work in the presence of such a hazard. What is that reasonable time which an employee may remain in the service of his master after a promise of repair has been made without assuming the hazard, and whether or not an employee is justified in continuing his work even upon such a promise being made, are, ordinarily, questions of fact for a jury, and, if reasonable minds might honestly differ regarding the conclusions to be reached upon these propositions, they are nevertheless questions for a jury under proper instructions. These rules are so well established that it is sufficient to state them without further elaboration; their application to the facts hitherto recited being apparent.

Defendant contends that it was plaintiff's duty to make the repairs, and that he can not hold another responsible for his own neglect. The testimony clearly negatives any such assumption. Plaintiff was not employed to do this work. A carpenter was employed for this purpose. Moreover, upon plaintiff's suggestion that he was willing to do the work for his own protection, defendant's foreman ordered him not to do it, saying that he (the foreman) would attend to that matter himself. Even if plaintiff's duties comprehended the repair of the floor, he was subject to the orders of his superior, and in obeying them was released of his duty to repair. These, too, are elementary propositions which need no fortification by authority.

3. SAME:  
duty of  
servant  
to repair.

The real question in the case, and the one most relied upon for appellee, is that plaintiff was guilty of contributory negligence in stepping into the hole which he knew, or should in the exercise of ordinary care have known, was in the floor. The

4. CONTRIBUTORY  
NEGLIGENCE:  
evidence.

testimony, as we think, fails to show that the room was dimly lighted. On the other hand, it seems to have been unusually well supplied with windows both on the south and west sides. The accident happened in June, at about 3 o'clock in the afternoon. The testimony does not show that the day was cloudy, and, if it were not, it is manifest that, even if the west windows were dirty and partly obscured by cheesecloth, the place where plaintiff worked and the floor in which the hole existed was unusually well lighted. This hole was near the end of a bench where plaintiff was constantly working, and, if he barely cast his eyes upon the floor, he could not help from seeing the hole which he described in his testimony. In other words, knowing of the defect, knowing of the danger incident thereto which caused him to complain to the foreman, knowing of the promises made to repair, and the failure to keep them, the natural impulse of any reasonably prudent person would have been to look for this defect to see if it had been remedied. Plaintiff said that he expected to quit at the end of the week in which he was injured if the defect was not repaired. He was injured on Friday, and by reason of his determination he naturally must have had a watchful eye to discover the condition of the floor. Under all the circumstances, it must be found as a matter of fact, from the undisputed testimony, that plaintiff knew of the defect and of the danger incident thereto at the time he received his injuries. It could not be otherwise if he exercised any sort of care for his own safety. Indeed, plaintiff did not testify that he thought the floor had been fixed, or that he did not know the hole was still uncovered. His exact statement is

that he stepped inside the four sides of an uncovered base for a moment, and then, in reaching for the acid which was upon the bench on which he was working, stepped with one foot outside the base of the monument and into the hole in the floor, which was just beyond the side of the base over which he stepped, forgetful, as he said of the hole, for the reason that he did not put the base in its then position. Was this conduct that of an ordinarily prudent person reasonably careful of his own safety in view of his knowledge of the defect in the floor? In its last analysis, it seems to us to be a case of pure forgetfulness or abstraction on the part of the plaintiff. Negligence, unless gross, is generally nothing more than this. It is the duty of an employee to use ordinary and reasonable care for his own safety, and if he knows of a defect and of its dangers, or should have known in the exercise of the degree of care required of him, his temporary forgetfulness will not excuse him. *Barnes v. Sowden*, 119 Pa. 53 (12 Atl. 804).

Of course, if there were any testimony tending to show that plaintiff, in view of the promise made to him by defendant's foreman, believed that the defect had been remedied we should be constrained to hold that the question of plaintiff's contributory negligence would have been for a jury under all the facts disclosed; but nowhere does plaintiff testify that he believed that the foreman had complied with his promise and repaired the defect. The excuse is that he forgot the presence of the hole, and he evidently relies upon this forgetfulness as excusing him. That it does not is clear, not only from the authorities, but on principle as well. There is a manifest distinction between forgetfulness and an attempt to avoid the dangers of a known defect, and a like distinction between forgetfulness and reliance upon a promise made by one with authority to remedy a known defect. Forgetfulness is negligence, while reliance upon the fulfillment of a promise

made by another or an attempt by one to avoid a known defect may constitute the highest care. These suggestions illustrate the fatal defect in plaintiff's case. He did not testify that he was attempting to avoid the known danger, but despite his care, went into the hole; nor did he testify that, because of Topliff's promise, he believed the defect had been repaired, and had no knowledge to the contrary until he stepped into the hole.

It is well in this connection, perhaps, to discriminate between assumption of risk and contributory negligence.

"Assumption of risk" is in effect a waiver of defects and dangers and a consent on the part of the employee to assume them, no matter whether he be careful or negligent in his conduct.

5. ASSUMPTION  
OF RISK:  
contributory  
negligence:  
evidence:  
distinction.

This consent is held to take away the injurious character of defendant's act, and is bottomed on the old maxim, "*Volenti non fit injuria*"—that to which a party assents is no wrong. In such cases the injured party may at the time be in the exercise of all the care which the law requires, and still have no right of recovery. This is clearly pointed out in the old case of *Thomas v. Quartermaine*, 18 Q. B. Div. 697. Of course, facts showing contributory negligence may also prove assumption of risk; but rarely, if at all, will proof that one did not assume a risk also show that at a given time he was in the exercise of ordinary prudence for his own safety. These distinctions have not always been observed, but they are essential to a proper application of the facts to a given case. See *Fitzgerald v. Connecticut Co.*, 155 Mass. 155 (29 N. E. 464, 31 Am. St. Rep. 537); *Dempsey v. Sawyer*, 95 Me. 295 (49 Atl. 1035); *Chicago & E. R. R. v. Heerey*, 203 Ill. 492 (68 N. E. 74); *Narramore v. Railroad*, 96 Fed. 298 (37 C. C. A. 499, 48 L. R. A. 68); *Davis Co. v. Pollard*, 158 Ind. 607 (62 N. E. 492, 92 Am. St. Rep. 319). As said in the last case, assump-

tion of risk is a matter of contract, express or implied; while contributory negligence is a matter of conduct.

Without more, it is enough to say that the trial court did not err in directing a verdict for the defendant.

The judgment must be, and it is, *affirmed*.

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EMIL BOECK, Appellant, v. WM. MILKE ET AL.

**Evidence:** COMMUNICATION WITH A DECEDENT. In seeking to establish title to a decedent's land under an oral contract, the party claiming the benefit of the contract is disqualified from testifying to personal communications made to him by decedent; but the stepfather of plaintiff is held, on rehearing, competent to testify that decedent promised him to give plaintiff the land on certain conditions.

**Real property:** ORAL CONTRACT TO CONVEY: EVIDENCE. To justify a decree settling the title to real property in pursuance of an oral promise the evidence must be clear, definite and conclusive: and this is especially true where the circumstance of taking possession and making improvements is lacking.

**Same:** DECLARATIONS OF A DECEDENT. Conceding that declarations of a decedent may be shown in aid of an oral promise to give another his land, still where the same are chiefly as to such an intention merely they are not very material evidence of a definite and specific contract to do so, and when made many years previously are of little weight.

**Oral contract to convey land:** EVIDENCE. Evidence reviewed and held insufficient to establish a claimed oral contract of decedent to give plaintiff his land in consideration that he live with decedent the remainder of his life.

*Appeal from Chickasaw District Court.*—HON. A. N. HOBSON, Judge.

TUESDAY, DECEMBER 15, 1908.

SUPPLEMENTAL OPINION THURSDAY, MARCH 18, 1909.



ACTION in equity to establish plaintiff's title to a certain tract of land, under an oral contract with John Milke, deceased, as against the defendants, who are alleged to claim some interest in the property described, as heirs of said John Milke. There was a decree for the defendants, and plaintiff appeals.—*Affirmed*.

*R. Feyerbend and Springer, Clary & Condon, for appellant.*

*Smith & O'Connor, for appellees.*

MCCLAIN, J.—Plaintiff claims title to a certain described eighty-acre tract of land, under an oral contract with John Milke, deceased, whose heirs are defendants in the action, alleged to have been made in 1887 by one Michael Ross, plaintiff's stepfather, when plaintiff was about thirteen years of age, by which said Milke agreed that, if plaintiff would live with him as a member of his household and family, and obey and take care of him in his declining years, plaintiff should have whatever real estate and other property said Milke might own at the time of his death. Said Milke died intestate in December, 1906, in possession of and holding the legal title to the eighty-acre tract of land in controversy. The evidence introduced in behalf of plaintiff tends to show that plaintiff came to this country in 1886, and lived in the family of his mother and stepfather, on a farm near that of said Milke, until April, 1887, when, after having attended a Lutheran school for some months, he was confirmed as a member of that church, and that in the meantime he had, for some indefinite period, been employed by said Milke and, further, that soon after his confirmation said Milke visited the home of plaintiff's mother and stepfather, and in plaintiff's presence made some arrangement with them by which plaintiff was to live with said Milke. As plain-

tiff's entire right of action depends on the terms of this alleged arrangement, which is directly testified to by the plaintiff, his mother, and his stepfather, we shall set out briefly the evidence appearing in the record as to what such arrangement was. The stepfather testified that John Milke, whom he had known as a little boy in the old country, and who had come to this country in 1884, said to witness that he (Milke) "got nobody around there. He was alone there. Why can't I let him have Emil"; and that he replied he had work enough for him, when Milke responded that "he liked that boy. He like to have him right along." And the witness further testified that Milke asked him to change Emil's name, which he refused to do; that a week or two later Milke came back, and asked "if he can get Emil. I said, 'No, I had plenty of work at home for him.' Then he says, 'Let me have that boy; I like him.' Then I asked my wife if she would let him go. She says, 'Yes, he can take him along.' Then John says, 'You never get him back more.'" In answer to a question as to what, if anything, Milke said he would do for Emil if the witness would let him go, the witness answered: "John promised me for Emil the property, all that he got there after his death. After John goes dead, Emil should have whole property. That is all." In response to a question as to what, if anything, Milke said as to what he wanted Emil to do, the witness replied: "Emil should do every kind of work he could do. He likes him all right; say he good boy." Witness also testified that Milke, in connection with this arrangement, gave him \$50, which is all the money or anything else he got from Milke, or any one else, for Emil. The mother, Conradine Ross, testified that three or four weeks after Emil came to America, he went to live with Milke, and remained with him that summer, and also on Saturdays and Sundays during the winter, while he was attending the Lutheran school; that she heard the conversation between her husband and

Milke in regard to the latter taking Emil, and that the latter said: "Now I like this boy; let me have him. I haven't any children, and if he stays with me, I will leave him this property. Then I will hold him as my son"; that then her husband said to her, "Let him go if he will give him the property as he said he would"; and that Milke then took Emil and said, "Now you will not get him back again." Witness further testified that Milke said in this conversation, "If he will be obedient and mind me, and do what I want him to do, then when I die I will give him my property. Then I will hold him as my son"; and that her husband then said, "If you will do this, it will be all right, you can take him with you." The plaintiff testified that about Easter, 1886, which he afterwards changed to 1887, he heard a talk between Milke and his father concerning himself, which he described as follows: "They talked about me. Mr. Milke came and said to father he wanted to have me. He wanted to change my name. And father told him, 'No, because I need him myself.' Then he went away that day"; and that Milke further said in another conversation in his presence: "I tell you what I'll do. I'll give everything I have got if he does good, and mind like I want him, give him everything after my death. That is what he promised me, just what Mr. Milke promised me."

There is quite a material conflict between these accounts as to what the promise of Milke was. Plaintiff in his petition alleged and in his testimony stated, that the promise was made directly to him, but  
1. EVIDENCE:  
communication  
with a  
decedent.  
the promise, as testified to by his mother and stepfather, was to the latter for plaintiff's benefit. This difference is quite material with reference to the admissibility of the evidence. If the promise was to the plaintiff, he was plainly incompetent, under Code, section 4604, to testify thereto, for that section prohibits a party, in an action against the heirs of a deceased

person, from testifying to personal communications made to him by the deceased. But the theory of plaintiff is, in fact, as indicated in argument, that the promise was made directly to the stepfather for plaintiff's benefit. If this be so, however, we think the stepfather was incompetent to testify with reference thereto, for plaintiff is claiming the benefit of such a contract made between Milke and his stepfather, and the section of the Code just referred to prohibits any person from, through or under whom the party derives any interest or title by assignment or otherwise, being examined as a witness in regard to any personal transaction or communication between such witness and the deceased.

Without regard to technical objections to the testimony of these witnesses, we reach the conclusion that the evidence is too indefinite and uncertain to sustain a decree awarding the property to the plaintiff. The case differs from many of those in which oral agreements to convey or will property are supported in the fact that plaintiff did not go upon the property to occupy it and make improvements. The circumstance of taking possession and making improvements, where it is found, furnishes a strong equity in favor of the claimant, and not only serves as the part performance which, under the statute of frauds, is necessary to render valid an oral contract to convey, but also tends to indicate that some promise was made. With reference to performance something further is to be said hereafter, but the absence of the circumstance of unequivocal action, in pursuance of the alleged promise, leaves the alleged promise itself without that cogent support which has been found in other cases where such promises have been enforced. See *Bevington v. Bevington*, 133 Iowa, 351, and cases therein cited. That the evidence to establish such a contract must be clear, definite, and conclusive has often been decided. *Briles v. Goodrich*, 116 Iowa, 517;

2. REAL  
PROPERTY:  
oral contract  
to convey:  
evidence.

*Chew v. Holt*, 111 Iowa, 362; *Truman v. Truman*, 79 Iowa, 506; *Williamson v. Williamson*, 4 Iowa, 279.

Many witnesses for plaintiff testified as to declarations, made by Milke in his lifetime, relied upon to furnish additional proof of the existence of the contract. Con-

ceding, for present purposes, that these declarations might be shown, we find that they were for the most part as to an intention, on the part of Milke, to give his property to plaintiff, and that they lend little countenance to the idea that he had already made such a definite and specific contract to do so as to prevent his changing his mind and refusing to carry out the arrangement if he saw fit. Such declarations of a deceased person, testified to by witnesses who say they heard them many years before their testimony is given, are entitled to very little weight. *Ellis v. Newell*, 120 Iowa, 71.

As a condition of the contract testified to by plaintiff and his witnesses was that he should, in effect, conduct himself toward Milke in a way which should be acceptable to the latter, it becomes important

to inquire what the relations of the parties were after plaintiff went to live with Milke under this alleged arrangement. It is quite satisfactorily shown that, until after plaintiff became of age, he resided with Milke, who was a bachelor and lived alone, save as plaintiff was with him, and that Milke treated him much as he would a son under similar circumstances. After becoming of age plaintiff still continued to make his home with Milke, although the nature of the services rendered does not very satisfactorily appear. For at least one year prior to their definite separation, to be hereinafter referred to, plaintiff seems to have worked the farm as a tenant for a share of the crops, and to have had a joint interest in the stock. There is a controversy as to whether, during the time plaintiff was thus living with Milke, the latter

3. SAME:  
declarations  
of a  
decedent.

4. ORAL CONTRACT  
TO CONVEY  
LAND:  
evidence.

paid him wages, and there is some evidence of an admission, made by plaintiff during that time, that such wages were paid, at least during plaintiff's minority, to his mother and stepfather. At any rate we find an absence of any very definite and conclusive showing that plaintiff, while residing with Milke, understood or claimed that he was doing so in reliance on a contract by which he was to receive property on Milke's death. In 1900 Milke and the plaintiff, in separate proceedings, were committed to a hospital for the insane, on account of mental derangement due to excessive alcoholism, and after their release some months later they lived apart. Here again the testimony is in conflict and confusion, but we are satisfied that plaintiff did not continue to occupy any such relation to Milke as we would naturally look for if the plaintiff regarded the arrangement with reference to the property as continuing in existence and force. Plaintiff was in the employment of others, and while he claims that he visited Milke on Sundays, and helped him about his farm, his testimony in this respect is almost entirely without corroboration. There is some testimony in behalf of plaintiff that Milke desired plaintiff to return, but this does not help out plaintiff's case. If plaintiff absented himself from Milke's home contrary to the latter's wishes, then plaintiff were not performing the conditions of the alleged contract. But the explanations as to this separation are various and unsatisfactory, and all we need say is that the relations of the parties after their return from the hospital was not such as to lend any support to the theory that plaintiff was still relying, if he ever relied, on a contract by which he was to be entitled to Milke's property on his death.

A few weeks before Milke died, and when he was very sick and alone, plaintiff did return and take care of him until his death, but immediately afterward, when the question of the temporary custody of Milke's property and its final disposition were under consideration, plaintiff

expressly said, in the presence of several witnesses, that he had no claim against Milke, except for his services during the last sickness, and he did not suggest, until after he had left the place and after the appointment of a temporary administrator on the application of Milke's heirs, that he had any claim to or interest in the personal property or the farm. The explanation given by plaintiff of this conduct is that he supposed he had no right to the property in the absence of some writing; but it seems to us incredible that, if plaintiff had, during all the years intervening between the making of the alleged oral contract in 1887 and the death of Milke in 1906, been engaged in the performance of the conditions of that contract under the belief and assumption that he should have this property on Milke's death, he would have made no claim that he was entitled to it when his rights had, according to his own theory of the case, become perfect. Plaintiff does not testify that on any particular occasion, or under any particular circumstances, he had been informed or become satisfied that a writing was necessary to enable him to enforce the contract under which he claims to have acted. His whole conduct can be consistently explained only on the theory that he had not been relying upon, or attempting to perform, the oral contract which is now the basis of this suit.

Without further detailing various considerations which occur to the mind in reading this record as having some bearing upon the credibility of the testimony of the various witnesses, it is sufficient to say that we are satisfied with the holding of the trial court that the contract relied upon has not been made out with the clearness and definiteness which ought to be required in such cases, and the decree of the trial court is therefore *affirmed*.

Supplemental opinion on petition for rehearing. Petition *denied*.

*R. Feyerbend and Springer, Clary & Condon, for appellant.*

*Smith & O'Connor, for appellees.*

**PER CURIAM.**—A majority of the court is now unwilling to be bound by the expression of the foregoing opinion in regard to the admissibility of the testimony of the foster father under Code, section 4604. Therefore, so far as this opinion is concerned, the action must be treated as based on a contract of the foster father for plaintiff's benefit, and the testimony of the foster father with reference to the making of such alleged contract is to be considered. But, as will appear by reference to the opinion, such evidence was fully considered, having been embodied in the record by the lower court, and we reached the conclusion that on the whole evidence the decree of the trial court was correct, and the petition for rehearing is therefore—*Overruled.*

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S. B. FRITZ, Appellant, v. C. M. FRITZ, J. M. BERRY,  
FRANK ZEMAN, A. STREIT and FRITZ AND FRITZ.

**Partnership: SETTLEMENT BETWEEN PARTNERS: ABANDONMENT: BURDEN**  
1 OF PROOF: EVIDENCE. The member of a firm seeking to set aside a written agreement of settlement of the partnership business, on the ground that it had been abandoned by them, has the burden of proving the abandonment, which can not be done by a showing of mere inference or indefinite understanding to that effect.

**Same: SUBSTITUTION OF NEW AGREEMENT.** The parties to a controversy  
2 over mutual obligations may substitute therefor the mutual obligations of a new agreement, and when this is done their rights and liabilities will be determined thereby. In the instant case the substituted agreement is held to have become effective as a new agreement, rather than that their previous obligations should be extinguished when the settlement was fully carried out.

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**Same:** RESCISSION. One partner can not rescind a contract of settlement between them regardless of the assent of the other by taking possession and disposing of partnership property as his own without tendering back any advantage he had already received under the contract.

*Appeal from Pocahontas District Court.*—HON. A. D. BAILIE, Judge.

WEDNESDAY, DECEMBER 16, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

THIS action was originally brought by S. B. Fritz against C. M. Fritz for dissolution of partnership, the appointment of a receiver, and an accounting. A receiver was appointed by agreement of the parties, and subsequently a stipulation of settlement of all matters involved in the suit was entered into. After this stipulation of settlement was filed in the case, plaintiff filed a supplemental petition praying that the stipulation of settlement be set aside and canceled, and that an accounting be had between the partners as though no such settlement had ever been made. In this supplemental petition J. M. Berry and Frank Zeman were named as additional defendants, and asked to account for the proceeds of certain land, the title of which had passed through their hands, formerly belonging to the partnership. A. Streit was also made defendant as the holder of the title to said land in trust for the partnership. On separate answers of the defendants denying in general the allegations of plaintiff's amended and supplemental petition, there was a trial resulting in a decree dismissing said amended and supplemental petition, and taxing the costs of the proceedings thereunder to the plaintiff. Plaintiff appeals.—*Affirmed.*

*Ralston & Shaw and D. M. Kelleher, for appellant.*

*Maurice O'Conner, Lynch & Berry, and W. C. Garberson, for appellees.*

McCLAIN, J.—The ultimate facts necessary to be determined in order to dispose of this controversy are few, and the rules of law applicable thereto are simple and practically undisputed. Prior to the institution of the original action for dissolution of partnership and accounting, S. B. Fritz and C. M. Fritz, under the firm name of Fritz & Fritz, had been engaged in the mercantile business, and had sold their stock of goods in October, 1903, to one O. J. Hubbard, receiving in exchange a half section of Minnesota land valued at \$7,000, which was subject to a mortgage of \$2,500. The stock was taken by Hubbard at a valuation of \$8,600, and Hubbard gave his note secured by a mortgage on the stock to the aggregate amount of \$4,100. The notes and accounts of the firm were not sold to Hubbard, but were retained in the possession of C. M. Fritz, and they aggregated about \$2,300. On Hubbard's failure to pay one of the purchase-money notes, Fritz & Fritz took possession of the stock of goods under their mortgage (in January, 1904), and brought a foreclosure suit against Hubbard, to which one Plummer was made defendant as holding a mortgage from Hubbard upon the stock; the contention of the plaintiffs in that suit being that the Plummer mortgage was subject to said plaintiff's mortgage, while Plummer claimed that by reason of some insufficiency in the recording of said plaintiff's mortgage he, Plummer, had acquired priority. Some arrangement was made between the parties to this foreclosure suit by which Fritz & Fritz were allowed to retain possession and dispose of the stock in the ordinary course of trade. The business was in this situation when S. B. Fritz instituted his action for dissolution of the partnership and accounting, C. M. Fritz having abandoned the part-

1. PARTNERSHIP:  
settlement  
between part-  
ners: abandon-  
ment:  
burden of  
proof:  
evidence.

nership business or which he had previously been the active manager. After the appointment of J. M. Berry as receiver, by agreement of parties a contract of settlement between S. B. Fritz and C. M. Fritz was entered into (November 26, 1904), in which it was stipulated that, for the purpose of making a settlement of all matters between the members of said firm, S. B. Fritz agreed to convey to C. M. Fritz all his right, title and interest in and to the real property above referred to and all other property of every kind and description embraced in the order of court appointing J. M. Berry as receiver, and it was further agreed that C. M. Fritz and S. B. Fritz were each to have one-half of all the book accounts, bills receivable, and other evidence of indebtedness growing out of the sale of goods, merchandise, etc., since January, 1904, and S. B. Fritz, however, to select from said book accounts, bills receivable, and other evidences of indebtedness a total amount in value of \$140, and provision for the division of the balance of said accounts and property was made. It was also agreed that C. M. Fritz should pay \$98.50 to plaintiff, and should satisfy the claims of Plummer, Hubbard, and the trustee in bankruptcy of the estate of Hubbard against the firm of Fritz & Fritz and against any property owned by the firm, and furnish satisfactory evidence of such settlement, and also pay the accounts of two other specified creditors in small sums. It was stipulated in this agreement that the two partners should each pay one-half of all other indebtedness existing against the firm, and one-half of all court costs and attorney's fees made at the instance of both parties, and each should pay the attorney's fees made at his own instance and request; further, that S. B. Fritz should have all the merchandise, goods, etc., belonging to the firm, being the whole of the remainder of said stock of goods reconveyed by Hubbard to said firm, and such additions thereto as had been made by the firm or either member thereof. The only stipula-

tion in the contract of settlement with regard to the time of performance was that the settlement by C. M. Fritz with the trustee in bankruptcy of Hubbard and with Plummer should not be later than the last day of the January term, 1905, of the court in which the chattel mortgage foreclosure was pending, and that as soon as such settlement should be made then all other parts of the agreement were to be carried into effect immediately, excepting that the land was to be transferred to C. M. Fritz whenever it should be necessary to close the deal with the trustee in bankruptcy of Hubbard and with Plummer.

After the making of this agreement of settlement the title to the land was by the voluntary action of both partners vested in J. M. Berry individually, and not as receiver, Berry to hold the title for C. M. Fritz. S. B. Fritz, who was already in possession of the stock of goods, proceeded to treat it as his own property, and to dispose of it without consultation with or accounting to C. M. Fritz. Settlement with Hubbard's trustee and Plummer was not effected during the January term, 1905, of the court, but at the May term following a default was secured in the foreclosure suit which disposed of all claims of Plummer and the trustee of Hubbard against the stock of goods. In the meantime, however, there had been omissions on the part of C. M. Fritz with regard to the carrying out of the terms of the contract of settlement which it is now claimed justified a rescission thereof by S. B. Fritz, and it is further claimed S. B. Fritz took advantage of such default on the part of the other party to the agreement and did rescind it.

One of the chief claims made for appellant as constituting a showing that the agreement of settlement was practically abandoned by both parties to it is that nothing was done on either side to carry out its provisions. But such a claim is not in accordance with the evidence. Before the time when the foreclosure suit against Hubbard

and Plummer was to be settled, S. B. Fritz had begun to treat the stock of goods received back from Hubbard by the firm as his own property, and had made no effort to account for his disposition of the goods or the proceeds thereof, and on the other hand S. B. Fritz had joined with C. M. Fritz in placing the legal title to the real property in the hands of Berry in trust for C. M. Fritz. In this respect, therefore, the agreement of settlement had been in fact fully performed.

There was a delay of several months in the adjustment of the settlement with Hubbard's trustee and Plummer, but it does not appear that any damage resulted to the plaintiff on account of this delay, and, when the judgment by default was secured extinguishing all pretended claims on the part of Hubbard's trustee and Plummer on the stock of goods, C. M. Fritz had substantially complied with the agreement of settlement in this respect. Two other small claims by creditors of the firm were to be satisfied, but it does not appear that such claims have been pressed as against plaintiff nor that they are of any validity, and failure of C. M. Fritz to perform in this respect has never been insisted upon by plaintiff as a ground of rescission. With reference to the failure of C. M. Fritz to make plaintiff a cash payment of \$98.50, it is enough to say that, before the filing of the supplemental petition asking a cancellation of the agreement of settlement, C. M. Fritz made a tender to plaintiff covering all his liability arising out of the agreement of settlement not already extinguished.

One other default on the part of C. M. Fritz is insisted upon by plaintiff, which consisted in the failure to pay an installment of interest on the mortgage subject to which the tract of land had been taken in exchange for the stock of goods. This installment of interest in the sum of \$116 fell due prior to the date of the settlement, and, as no provision in the agreement had reference to the pay-

ment of such indebtedness, it was a debt equally of S. B. Fritz and C. M. Fritz, who jointly held the title to the land. When, therefore, foreclosure of the mortgage was threatened in March following the settlement, if this installment of interest was not paid, there was no more obligation on the one member of the firm than on the other to make such payment, unless when title had been vested by mutual consent in Berry there was some specific undertaking binding him as trustee, or binding C. M. Fritz, to extinguish such indebtedness. No such undertaking is shown. It was not unnatural, therefore, that Berry should have applied to plaintiff to satisfy such claim and prevent a foreclosure, for such foreclosure would in fact have resulted in loss to the plaintiff; C. M. Fritz being, as it would seem, practically insolvent if this land was lost to him, and therefore unable to carry out the other parts of the settlement for the protection of plaintiff. The advancement of this sum of money by plaintiff was then nothing more than an advancement of one-half of the interest charge to C. M. Fritz in a matter not covered by the agreement of settlement, and, as it appears that plaintiff then had in his hands accounts of a considerable value in which C. M. Fritz had an interest, such advancement did not in itself show an intention on the part of plaintiff to rescind the agreement of settlement. There is much contradictory testimony as to what was said between Berry and plaintiff at the time this advancement was made, and it is insisted that plaintiff acted for the preservation of the property only after he had a definite arrangement that the agreement of settlement should be treated as abandoned. We are satisfied, however, that plaintiff has not in this respect established his case. Something more than mere inference or indefinite understanding ought to be shown in order to establish the setting aside of a written agreement of settlement formally entered into between the parties. In this respect the plaintiff had the burden of

proof, and he has not made out his case by a preponderance of the evidence.

Other conversations between plaintiff, Berry, and one Steinbilder, with whom it is said plaintiff listed the land for sale in disregard of the agreement of settlement, are also relied on as showing a mutual abandonment thereof. But here again there is much contradiction between the accounts of the witnesses, and we can do no more than say that plaintiff's contention is not sustained.

It is of considerable significance that no witness testifies as to any express and specific rescission of the agreement of settlement by plaintiff or renunciation thereof by C. M. Fritz. Whatever was said according to the testimony of any witness tending to show such rescission or abandonment was said as between plaintiff and Berry, who was the attorney of C. M. Fritz after the agreement of settlement was made, and it does not appear that Berry had any authority from Fritz to agree that this contract should be modified or superseded.

The legal proposition relied upon for plaintiff is that the agreement of settlement did not amount to an accord and satisfaction between the parties until it was carried out, and it must be conceded that if the agreement contemplated a settlement only when its provisions should be performed by C. M. Fritz, then it did not become effectual. On the other hand, it is well settled that the parties to a controversy in regard to their mutual obligations may substitute therefor the mutual obligations of a new agreement, and that when this is done their respective rights and liabilities are to be determined by the new agreement which has been substituted for such duties and obligations as previously existed. *Hall v. Smith*, 15 Iowa, 584; *Merry v. Allen*, 39 Iowa, 235; *Sioux City S. Y. Co. v. Sioux City P. Co.*, 110 Iowa, 396; *Lindt v. Schlitz Brew. Co.*, 113 Iowa, 200; *Smith v. Elrod*, 122 Ala. 269 (24 South. 994);

2. SAME:  
substitution  
of new  
agreement.

*Gulf, C. & S. F. R. Co. v. Harriet*, 80 Tex. 73 (15 S. W. 556).

There is some language in the agreement of settlement as already described which might support the contention that only a performance of the terms of the agreement by C. M. Fritz would relieve him from his previous obligations, but taking the language as a whole we are satisfied that the purpose of the parties was to extinguish their previous rights and liabilities and substitute therefor the rights and liabilities specified in the agreement. This view is corroborated by the fact that no specific time is mentioned for the performance of several of the obligations named in the agreement, and that after it was made the conduct of both parties was consistent with the theory of a substitution of an executory agreement rather than with the theory of an agreement that their previous rights and liabilities should be extinguished only when the settlement was completely carried out.

Finally, with reference to the right on the part of plaintiff to rescind regardless of assent on the part of C. M. Fritz, it is sufficient to say that such rescission could only be made on tendering back the advantage which plaintiff had already received under the contract of settlement by taking possession and disposing of the stock of goods as his own, and this plaintiff never attempted to do.

3- SAME:  
rescission.

We are satisfied, therefore, that the trial court correctly held the agreement of settlement to be a complete substitution for the pre-existing rights and liabilities of the parties as partners, and that plaintiff therefore failed to show himself to be entitled to any relief under his amended and supplemental pleading.

The decree is *affirmed*.



141	730
143	430

MUELLER LUMBER COMPANY v. JOHN McCaffrey,  
Appellant.

**Appeal:** MOTION FOR NEW TRIAL: TIME FOR PERFECTING. Errors presented in a motion for a new trial will be reviewed where an appeal from the ruling thereon is taken within six months, although the time for appealing from the judgment in the action had expired.

**Partnership:** PAYMENT OF FIRM DEBTS BY CONTINUING PARTNER. The agreement of a partner continuing the business that he will pay the firm debts in consideration of a transfer to him of the interests of the retiring partners in the firm property may be enforced.

**Same:** DELAY IN BRINGING SUIT: ACCEPTANCE OF AGREEMENT. Delay in suing on the agreement of a continuing partner to pay the firm debts will not defeat the action, unless barred by statute; and commencement of action is a sufficient acceptance of such agreement.

**Same:** RESCISSION. A continuing partner who agreed to pay the firm debts in consideration of a transfer to him of their interests in the property, can not avoid liability therefor on the ground of rescission, where he had made no offer to return the consideration received; and such failure can not be excused by a showing that the retiring partners did not desire a return of the property.

**Appeal:** FORFEITURE: PRESUMPTION. Where a continuing partner agreed to pay the firm debts in consideration of a transfer to him by the retiring partners of their interest in the property, he can not urge on appeal from a judgment in favor of a creditor that a lease of mining property held by the firm had been forfeited at the time of the transfer to him, and that there was no consideration for his assumption of the debts, where the record did not show a forfeiture; as a forfeiture will not be presumed.

**Partnership:** ASSUMPTION OF INDEBTEDNESS: FRAUD: EVIDENCE. In an action by a firm creditor to recover of one partner continuing the business on the strength of his agreement to pay the firm debts, the evidence is held insufficient to show that a retiring partner had knowledge of false representations made to defendant regarding the condition of the property.

*Appeal from Scott District Court.*—HON. A. B.  
BARKER, Judge.

SATURDAY, DECEMBER 19, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

JACK and H. S. McCaffrey and C. W. Major became indebted to plaintiff for lumber in the sum of \$324.76 and for material to the Penn Oil & Supply Company in the sum of \$63.31, which was assigned to plaintiff. On December 8, 1904, the defendant entered into a written agreement with said persons to pay the same. It appears that they were in partnership in the opening and improvement of a coal mine in Illinois with a view to its operation. The Henepin Coal Company had been incorporated by them, but neither the property nor their lease of the land had been transferred to it, the land belonging to John McCaffrey Towing & Mining Company, of which defendant was principal stockholder. According to the recitals in the contract, the lease has been forfeited. All the property acquired by the parties first mentioned, together with the lease, tracks, tools, machinery, and the like used in connection with the mine, were turned over to defendant in consideration of his agreement to pay the debts of the co-partnership. Several defenses were interposed, all of which were resolved by the court and jury against defendant, and he appeals.—*Affirmed.*

*Sharon & Donegan, for appellant.*

*Isaac Petersbergher, for appellee*

LADD, C. J.—The appeal was not perfected within six months from the entry of judgment, and for this rea-

son errors in the record other than disclosed in the motion for new trial can not be considered. The order overruling the motion for new trial was within six months before the appeal, and for this reason is reviewable in this court. Section 4110 provides that: "Appeals from the superior and district courts may be taken to the supreme court at any time within six months from rendition of the judgment in any cause or order appealed from and not afterward." Section 4106 obviates the necessity of filing a motion in order to challenge any ruling in the record, and this even though such motion be pending at the time. *Hunt v. Railway*, 86 Iowa, 15. The ruling by which a motion for new trial is overruled remains an appealable order, however, and the subject of review. *In re Estate of Bishop*, 130 Iowa, 250. The result is, a litigant may, but is not required to, challenge the correctness of the court's rulings a second time. Section 3755 of the Code expressly authorized a motion for new trial based on any or all of nine grounds. These need not be enumerated. It is enough for present purposes to say that one of these is "for error of law occurring at the trial," excepted to by the party making the application, and another that the verdict is not sustained by sufficient evidence. The manifest design of such motion is to enable the court to review its rulings entered during the trial at greater leisure and upon full investigation, to the end that, if errors are discovered, these may be corrected, rather than the parties be put to the trouble and expense of an appeal. The ruling on each point raised, though it may be but a repetition of a previous ruling, is quite as decisive. The statute expressly authorizes either party to challenge the correctness of any ruling during the trial by motion for new trial, and he is entitled to a ruling thereon. This involves a decision covering each ground of the motion, and, as the order granting or denying a new trial, is appealable. This neces-

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motion for  
new trial:  
time for  
perfecting.

sarily authorizes a review of each of the several grounds asserted. For this reason, separate assignments of error were exacted under a former statute requiring assignments of error. *Moffit v. Albert*, 97 Iowa, 213. Because errors asserted in a motion for new trial appear in the record and might be taken advantage of on appeal, had no such motion been filed, furnishes no ground for saying that they may not be reviewed when raised in a motion for new trial, if the appeal from the ruling thereon be timely, even though more than six months has elapsed since judgment. *Kendall v. Lucas County*, 26 Iowa, 395. Otherwise, the right to appeal from the ruling on a motion for new trial, save because of something transpiring subsequent to the verdict or decree, would be valueless. In the recent case of *McLaughlin v. Hubinger Bros. Co.*, 135 Iowa, 595, it appears to have been held in such a case that only errors not inhering in the judgment may be reviewed. The decision last above cited, in which the contrary was held, evidently was overlooked, and the authorities relied on do not appear upon closer examination, to support the conclusion. In *Cohol v. Allen*, 37 Iowa, 449, the amendment to the motion for new trial was treated as a petition therefor on the ground of newly discovered evidence, and the motion for new trial at once overruled, and judgment entered. The amendment was ruled on long after, and, as the appeal was taken more than six months subsequent to the entry of judgment, only the ruling on the amendment was considered. In *Carpenter v. Brown*, 50 Iowa, 451, the petition for new trial on the ground of newly discovered evidence was filed more than six months after the entry of judgment, and therefore after all right to appeal from rulings inhering therein had expired. In so far as appears, there was no motion for new trial. In *Patterson v. Jack*, 59 Iowa, 632, the motion for new trial was not filed until four months after judgment, and was therefore too late, save on the ground of newly discovered evi-

dence, and for this reason none other than the ruling on this ground was reviewed. In *Bosch v. Bosch*, 66 Iowa, 701, the appeal was ten months after the entry of judgment, and, though the motion for new trial was overruled within six months prior to the appeal, no assignments of error were made, and for this reason the court declined to consider those argued and dismissed the appeal. In *Jones v. Railway*, 36 Iowa, 68, the court merely held that the ruling on a motion for change of venue might be challenged on appeal from the judgment subsequently entered. It does not appear in *Wambach v. Grand Lodge*, 88 Iowa, 313, whether a motion for new trial had been filed. In *Palmer v. Rogers*, 70 Iowa, 381, the court adjudged that in an appeal from final judgment an order setting aside default may be reviewed. There are decisions in other jurisdictions to the effect that time of appeal may not be extended by delay in ruling on motions for new trial, but these are based on statutes limiting the period within which an appeal may be taken from the entry of judgment and not, as in this state, from the entry "of judgment or other orders." *Houser v. Hargrove*, 29 Cal. 90 (61 Pac. 661); *Vickers v. Tyndall*, 168 Ill. 616 (48 N. E. 214); *Hill v. Hill*, 114 Mich. 599 (72 N. W. 597); *Patterson v. Greenville National Bank*, 101 Tenn. 511 (48 S. W. 225). Other authorities are to the effect that, where a motion for new trial is essential to a review of errors assigned, there is no final judgment, within the meaning of the statute relating to appeals, until the ruling on the motion. *Atkinson v. Williams*, 151 Ind. 431 (51 N. E. 721); Thompson, Trials, section 2730; *Sharp v. Brown*, 34 Neb. 406 (51 N. W. 1030); *Snow v. Rich*, 22 Utah, 123 (61 Pac. 336).

The theory of these last decisions is that, though judgment has been entered, if the motion is filed in proper time, the proceeding is *in fieri* until the motion is denied, and until then the judgment must be considered as in

paper or as suspended as a role, in the common-law sense by the motion. All this is obviated by the statutes of this State, which authorize an appeal from the judgment or order entered on the motion for new trial. The appeal may be prosecuted notwithstanding the pendency of the motion. *Hunt v. Railway*, 86 Iowa, 15. And there is no apparent reason for saying that the ruling on the different grounds set up in the motion for new trial may not be reviewed, even though the time has elapsed in which the original record might furnish the basis of review. Certainly, the errors alleged in the motion have not been waived, for the statute expressly authorizes presenting them in this way. The Code seems to contemplate the entry of judgment immediately upon the return of the verdict or announcement of its finding by the court, and, unless a litigant may rely on the correction of errors in an appeal from the order sustaining or overruling the motion for new trial, he will be driven in many cases to carry his case to the appellate tribunal before he can know whether the relief will be granted by the *nisi prius* court. If anything, the ruling on the motion for new trial is of greater significance than that originally made, being with greater deliberation and with an adequate perspective of the entire trial. Errors therein should be quite as available on appeal as when made during the previous trial or hearing. For the reasons stated, we are inclined to recede from the ruling in *McLaughlin v. Hubinger Bros. Co.*, 135 Iowa, 595, and follow the rule as announced in *Kendall v. Lucas County*, 26 Iowa, 395, more than forty years ago.

II. It appears that defendant's two sons and one Major were in partnership in the development of a coal mine in Illinois, which the firm had leased of the John McCaffrey Towing & Mining Company, of which defendant was principal stockholder. As matters did not progress satisfactorily, defendant, in consideration of the transfer of

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payment of  
firm debts by  
continuing  
partner.

all the partnership property to him, agreed to pay the debts of the firm, including that to the plaintiff and to another since assigned to it. As this contract with the copartnership was made for the benefit of plaintiff and its assignor, it can maintain the action. *Johnson v. Collins*, 14 Iowa, 63; *Beeson v. Green*, 103 Iowa, 406.

- Delay in suing thereon would not defeat the action, unless barred by the statute of limitations.
3. SAME: delay in bringing suit: acceptance of agreement. The beginning of an action on such a contract is a sufficient acceptance thereunder.

There was no evidence whatever of rescission. The defendant neither advised any member of the firm of an intention to rescind, nor tendered back any of the property received. The consideration stipulated was received in part at least, and to rescind for failure of consideration that received should have been tendered back. What the other party to a contract may think of his wanting the property had it been tendered is not important, in view of there being no indication of a purpose to rescind on the part of the vendee.

- The suggestion that, as the lease was forfeited, the lumber on the premises became the property of the lessor, is not based on the record, for the terms of the lease are not disclosed, and the forfeiture of property will not be presumed in the absence of any proof. Nor was there error in the first instruction, for, though the agreement recited that the lease had been forfeited, it in express terms assigned all the right, title and interest of the copartnership in it to the defendant. No prejudice could have resulted if it were otherwise.
5. APPEAL: forfeiture: presumption.

Whether the contract was induced by fraud was fairly submitted to the jury. The court instructed that relief could only be had upon finding that Henry McCaffrey knowingly misrepresented that the water had all been

pumped out of the mine except a few days' pumping, and it is contended that, inasmuch as Henry acquired this information from Major, and Major was in actual charge of the mine, the knowledge of its falsity by Major would suffice, as what Henry said was in behalf of the copartnership. Without deciding the point, it is sufficient to say that Major was not shown to have had such knowledge. Henry testified that: "There was a man that Mr. Major had in charge of the pumping that misrepresented the entire works in the mine. I made the statement to defendant that was made to me, and that statement was not correct, that is, in regard to the water in the work what was done inside the mine. They lied about the amount of pumping that had been done in there, the amount of water that still remained in the mine. One side of the mine was full of water in June, 1904." Manifestly, he was referring to the man employed, and long prior to the date of the contract, which was December 5, 1904. Again, he testified that: "I told defendant just what Mr. Major told me, that they could get within forty feet of the south wall." He then stated that, according to the account from one who inspected the mine a few days after they quit, there was then a whole lot of water in the mine. How long after he was unable to say. Later he qualified his previous statement by saying Mr. Major or Mr. Gunry had told him. Major testified that the water was lowered until "we got to the back end of the mine," and about one thousand tons of coal were removed, which were under water when pumping was commenced three months previous. If Major knew differently than stated to Henry, or if the condition of the mine was not as said to have been represented by Major on December 4 or 5, 1904, the record fails to disclose it. That it may have been full of water two or three months later is not proof of its condition on the day named. Undoubtedly, defendant made a bad bargain. He expended a

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assumption  
of indebted-  
ness: fraud:  
evidence.



large amount of money in an effort to clear the mine of water and in other respects, and finally abandoned his enterprise.

But no reason appears from the record before us for relieving him from his obligation, and the judgment is *affirmed*.

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KOSSUTH COUNTY STATE BANK V. MATTHEW RICHARDSON  
and ELLEN RICHARDSON ET AL., Appellants.

**Appeal:** REMAND FOR FURTHER PROCEEDINGS: ADMISSION OF ADDITIONAL  
1 EVIDENCE. Ordinarily the reversal of an equity action upon trial *de novo* terminates the litigation, the opinion indicating simply the character of the decree to be entered; but in furtherance of justice the appellate court may remand the cause for further proceedings, when, upon the filing of a *procedendo* the cause is before the lower court precisely as when originally submitted; and leave to introduce further evidence, omitted through inadvertence, may, upon proper showing and in the discretion of the court, be granted.

**Same:** REFERENCE OF CAUSE. Permission to offer additional evidence  
2 after a reversal upon a trial *de novo* in the appellate court is not a matter of absolute right, but of discretion reposed in the trial court, which should only be indulged where the proposed evidence has been discovered since the submission, or acts have occurred pending the proceedings vitally affecting the relief to be granted. In the instant case it was not an abuse of discretion to reopen the case for the purpose of receiving additional evidence to take the place of certain incompetent evidence received upon the original trial; and it is also held that the court properly heard the additional evidence without again referring the case to the referee before whom it was originally heard.

**Same:** AMENDMENT OF PLEADINGS: CHANGE OF POSITION. Where a  
3 cause has been tried *de novo* on appeal and remanded for further proceedings with respect to a particular finding of the trial court, the filing of an amendment changing the claim of the party on another issue, which was determined on the original submission and approved on the appeal is not authorized: as where a complete settlement was pleaded, found by the trial court and approved on appeal, an amendment withdrawing the plea and alleging instead that the settlement did not include all matters of

difference. Moreover as no additional evidence was received on the subject it was not permissible as conforming the pleading to the proof, and was too late to conform to the proof originally offered.

**Same: FINDINGS BY COURT: CONSTRUCTION: CONFLICT.** Although the 4 findings in an equity action are to be treated as special verdicts, still in ascertaining the intent of each they must be construed with reference to one another; and when so construed it was apparent that certain items of an account, concerning which there was no dispute, were not treated by the court as involved in a claimed settlement there was no conflict, even though one finding standing alone indicated that all rights of the parties to the date of the settlement were disposed of.

**Evidence: BOOKS OF ACCOUNT: ORAL EXPLANATION.** Where proper 5 foundation has been laid for the introduction of books of account oral evidence is admissible to explain figures or abbreviations which are not self-explanatory.

**Same: EFFECT AS EVIDENCE.** Books of account when offered in evi- 6 dence stand in an important sense as a witness or deposition in the case, and their value as evidence depends largely upon their condition and the manner in which they have been kept; and as a general rule charges therein, to establish liability, must be specific and particular. Bank books showing debit and credit items between the parties are held insufficient to show that the bank had accounted to defendant for certain moneys collected.

*Appeal from Kossuth District Court.*—HON. A. D. BAILIE,  
Judge.

SATURDAY, DECEMBER 19, 1908.

REHEARING DENIED THURSDAY, MARCH 18, 1909.

ACTION to foreclose three mortgages. The defendant pleaded a counterclaim. The cause was referred, and to the report of the referee exceptions were filed. The district court's rulings thereon were approved, save that on exceptions to the eleventh finding. As to that the decree was reversed and the cause remanded for proceedings not inconsistent with the opinion. 132 Iowa, 370. Upon re-

mand, the district court, on application of plaintiff, opened the case and received additional evidence bearing on the issue involved in said finding, and, after its introduction, permitted plaintiff to amend its reply to conform with the proof. Decree was then entered as at the former hearing. The defendants appeal.—*Modified and affirmed.*

*Sullivan & McMahon, E. V. Swetting, and E. A. & W. H. Morling, for appellants.*

*W. B. Quarton, for appellee.*

LADD, C. J.—On the former appeal the district court's rulings on all the exceptions to the report of the referee, save on these to the eleventh finding, were approved. 132 Iowa, 370. This finding was: "That since the date of said settlement, to wit, on or about the 30th of April, 1894, there was a running account between plaintiff and defendant Richardson up to October 30, 1898, and there is due Richardson on said account \$213.82, as shown by plaintiff's Exhibit 75." It appeared that during this interval plaintiff had received and collected on notes belonging to defendant, held as collateral security, the sum of \$4,661.84. This was unaccounted for save by Exhibit 75, which, as a mere copy of the bank ledger, was denounced by this court as incompetent evidence, and the cause "remanded to the district court for proceeding not inconsistent with" the opinion. A petition for rehearing was "overruled without prejudice to the right of the appellee to make application in the district court for permission to introduce further evidence." *Procedendo* issued, and on February 1, 1907, plaintiff moved that the cause be reopened and leave be granted to introduce additional testimony. The above facts were recited and furtherance of justice stated as a ground for the relief prayed. The motion was supported by an affidavit to the effect that owing to certain in-

vestigations the accounting for the moneys collected was not supposed by plaintiff's counsel to be questioned, and he had thought the exhibit referred to properly in evidence. In both respects the record shows that he was mistaken.

Conceding this to have been so, however, we are of opinion that opening the case and receiving further evidence bearing on the eleventh finding of the referee was not an abuse of the court's discretion. This

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further  
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admission  
of additional  
evidence.

court had reversed the order of the District Court in overruling the exceptions to the particular finding of fact, and remanded for proceedings not inconsistent with the opinion,

and the cause in respect to such finding upon the filing of the *procedendo* was before the District Court precisely as though originally submitted; the court being fully advised in the premises and the decision announced, though not entered of record. *Adams County v. Railway*, 44 Iowa, 335. After an original submission, leave to introduce evidence omitted through inadvertence, upon a proper showing, in the discretion of the trial court, might be granted, and, under the last-cited case, the same rule obtains when the cause has been remanded to the District Court for proceedings not inconsistent with the opinion. Moreover, the matter was relegated by this to the trial court for its determination. Ordinarily a reversal upon hearing *de novo* terminates the litigation, the opinion indicating the character of decree to be entered; but, whenever essential to effectuate justice, an appellate tribunal may remand to the trial court for such further proceedings as the circumstances of the particular case require. *Kreuger v. Walker*, 80 Iowa, 733; *Id.*, 94 Iowa, 506; *Byington v. Buckwaller*, 7 Iowa, 512. See *Brewer v. Hugg*, 114 Iowa, 486. This rule obtains elsewhere. *Landry v. Adeline Sugar Factory Co.*, 50 La. Ann. 542 (23 South. 621); *Wilkins v. Detroit*, 46 Mich. 120 (8 N. W. 701, 9 N. W. 427); *Smith v. Wilkins*, 31 Or. 421 (51 Pac. 438);

*Jenkins v. Jenkins University*, 17 Wash. 160 (49 Pac. 247, 50 Pac. 785).

The authority of this court in its discretion to remand for the introduction of additional testimony then can not be doubted. If endowed with such authority, it also might remand with direction to the District Court to receive such testimony, if so advised, and that is precisely what was done in this case. The proceedings in the District Court were not to be inconsistent with the opinion, and, by the ruling on the petition for rehearing, the decision of this court was not to prejudice an application for the introduction of other evidence. The effect of these orders was to leave the entire matter for the determination of the District Court.

Of course, permission to introduce additional evidence after reversal is not a matter of right, and seldom should such indulgence be given, save where evidence has been discovered since the submission, or acts have occurred pending the proceedings, vitally affecting the relief to be granted; but this case is exceptional. Plaintiff had collected a large amount of money belonging to defendant, and the only evidence explanatory of its disposition or application has been adjudged incompetent. True reliance on the evidence declared incompetent was due to the mistaken judgment of counsel then appearing for plaintiff; but, as his opinion was shared by both the referee and District Court, it will not do to say that he was utterly without excuse. The order of the District Court permitted the introduction of competent evidence in its stead, clearly was in furtherance of justice, was not beyond the court's discretion, and has our approval. The authorities relied on by appellant are not in point. In *Chicago, Milwaukee & St. Paul R. Co. v. Hemenway*, 134 Iowa, 523, setting aside a former submission after appeal to enable the company to try the cause on a new theory, was adjudged to be error. Most of the

2. SAME;  
reference  
of cause.

other decisions cited relate to the filing of amendments to pleadings, as *Allen v. Davenport*, 115 Iowa, 20, holding that a new cause of action might not be set up by way of amendment after reversal, and *Zalesky v. Insurance Co.*, 114 Iowa, 516, deciding that, after twice submitting a case on admissions in the pleadings, an amendment setting up a denial of facts previously admitted was not permissible. See, also, *Wilhelmi v. Insurance Co.*, 103 Iowa, 532; *City Council of Marion v. National Life & Investment Co.*, 130 Iowa, 511.

Ordinarily, where an issue is to be retried, the practice is to refer the cause back to the referee. Here the court received the evidence and determined the issue. There was no error in this. The report of the referee is reviewable on exceptions filed. Section 3740, Code. In a law action sustaining the exceptions necessarily results in a new trial. *Lyons v. Harris*, 73 Iowa, 292. But equitable actions are under the control of the court, and it may make a new finding of fact or of conclusions of law and enter such a decree as the referee should have recommended in his report. *McHenry v. Moore*, 5 Cal. 90; *Wentzville Tobacco Co. v. Walker*, 123 Mo. 662 (27 S. W. 639); *Calvert v. Nickles*, 26 S. C. 304 (2 S. E. 116). In its discretion the court may recommit the cause to the referee, with instructions to receive additional evidence. *Tharington v. Tharington*, 99 N. C. 118 (5 S. E. 414); *Lowndes v. Miller*, 25 S. C. 119; *Murphey v. Shepardson*, 60 Wis. 412 (19 N. W. 356). Or the court may receive such additional evidence, pass on the issues, and enter decree. As the court must ultimately pass on the evidence, there is no reason for saying it may not retain the case for such procedure as may seem advisable.

II. It will be noted that the case was opened to receive evidence bearing on the eleventh finding only. After the evidence had been received, however, plaintiff filed an amendment to its original reply, withdrawing the fourth

paragraph thereof, in which it alleged that on or about

3. SAME: amendment of pleading: change of position.  
April 30, 1894, "a settlement was had and entered into by and between plaintiff and Matthew Richardson, and that in said settlement all matters of difference existing between them were adjusted, settled and closed, and the defendant Matthew Richardson at said time made and delivered to this plaintiff a certain written promissory note and real estate mortgage, for three thousand dollars (\$3,000) which said sum was at that time found to be due and owing plaintiff from the defendant," together with the notes of \$500 and of \$600, which "are accurately described and set out in plaintiff's amended and substituted petition in this cause, . . . and was made and delivered to plaintiff at the time of said settlement, and for a balance due and owing plaintiff over and above all credits and offsets, and was made and delivered to plaintiff in full settlement and adjustment of all accounts and differences between plaintiff and defendant to that date, and all matters of difference of whatsoever nature between the plaintiff and the defendant were at that time fully adjusted and settled, and such collateral notes as plaintiff had on hand, and all collateral notes that plaintiff had placed in the hands of collectors, or any and all collateral paper which defendant had placed in plaintiff's hands or under its control, to secure defendant's indebtedness, were at the time of said settlement released and surrendered and given over to the defendant, and all plaintiff's rights or claims in and to the same were released, and since the date of said settlement this plaintiff has received no collateral securities, or securities of any kind or description." The reason stated for filing the amendment was that the testimony now shows that the said settlement did not cover all the matters and differences of parties existing on that date, but, on the contrary, only covered and pertained to the surrender and release to the defendant of

the three \$1,000 notes and certain collaterals which the plaintiff held as security and the taking of the \$3,000 note and mortgage in suit in this case in lieu thereof, and, further, that the testimony then introduced showed a running account extending from 1887 to 1898, which had not been settled, and on which but a small balance was owing defendant. Defendant moved to strike on grounds: (1) That the amendment came too late; (2) it was not properly verified; (3) that plaintiff ought not to be allowed to change positions; and (4) the issue sought to be changed had been adjudicated. This motion was overruled, and erroneously so, for the cause had been fully submitted, and was opened to let in evidence on but a single issue. If other evidence was received, this was over the objections of defendant, and in plain disregard of the court's order. *Adams County v. Railway*, 55 Iowa, 94. In such a case, the provision of section 3600 of the Code, authorizing an amendment which "does not change substantially the claim or defense by conforming the pleadings or proceedings to the facts proved," has no application. To justify the filing of an amendment after the remand of a cause heard *de novo* in this court, matters must have arisen subsequent to the decree, or things must have happened pending the proceedings, which could not have been considered at the trial or owing to some other contingency which reasonable foresight could not well have guarded against. *Sexton v. Henderson*, 47 Iowa, 131; *Shorthill v. Ferguson*, 47 Iowa, 284; *Adams County v. Railway*, 44 Iowa, 335.

The cause was originally heard on the issue of settlement pleaded in this reply. Evidence had been introduced by both parties bearing thereon. The assistant cashier of plaintiff had testified:

Exhibits E and F are notes executed to the Kossuth County State Bank by Mr. Richardson. I wrote the papers up for him to sign. I met him on the street, and told him I noticed by the docket over here there were several judg-



ments going of record against him, and he said, 'Yes, he knew there was a few.' He says, 'I think I better give you a mortgage on my land I have got in my name, so that you will be ahead of them.' I says: 'All right, you can. You have got it down to only \$3,000, and you can give us a mortgage there. Of course, the land is not worth that. You can give us a mortgage, and take up a lot of the old paper.' He says, 'That is just what I want to do.' Well, I told him then that, as the land would not be worth the mortgage, the \$3,000 and the two small ones against it, that he must clear off the judgments. He said he would do this, so that we would be the second lien on the land, and so I drew this mortgage for him, and he signed it in the little old building he used to have up there, and Mrs. Richardson came there, and she signed it also, and Ed went up and took their acknowledgment some time after, and we were a few days fixing it up, and then he came down. He says, 'I want you to come with me to Gene Clarke's office so he can't kick and claim any.' So I went with him and gave Gene orders that he need not turn any more money to us, to give it to Richardson, and in May he gave him the balance of the paper he had; but he came in afterwards and borrowed a small amount, and left a few notes there, and those were taken right up when he paid his notes. That was, I think there was no record or anything made of them. I ain't sure, something like a week, or something like that, he wanted a little money. It was our last deal. He ain't claimed anything or we ain't. That was the settlement, we cleaned up that time, and we were to take the \$3,000 mortgage. He was to pay the judgments off that was against him so as to leave us second lien on the land. The conversation was, simply we agreed that he should take all the notes, all collateral notes. He says, 'I suppose you will give me all my old notes if I give you this mortgage,' and I says, 'Yes, sir; we will.' I personally gave him all the notes we had in the bank, turned them over to him, and told him, 'I have marked them off the register.'

On the other hand, Richardson testified that, though the bank agreed to turn over to him \$3,000 in collateral paper, it finally refused to do so, and never delivered to

him any notes save a few, aggregating in face value \$120. The cashier admitted the bank did not return the collaterals until the judgments were paid. Moreover, there was an adjudication on this precise issue which had not been set aside or modified in any way. The fourth and fifth findings of the referee were responsive to the issue thus pleaded and the evidence referred to, and may be set out: "(4) That on or about the 30th day of April, 1894, there was a full and complete settlement of all matters existing between plaintiff and said defendant M. Richardson, and that said defendant Richardson made to plaintiff the \$3,000 note and mortgage; said sum being the amount due from said defendant to plaintiff. (5) That at the time aforesaid, to wit, about the 30th day of April, 1894, said plaintiff accounted for and delivered to said Richardson all notes held or delivered to it by said defendant Richardson, as collateral security or otherwise." Exception was taken to each of these by defendant, on the ground that the evidence adduced showed that the collateral notes had not been surrendered by the bank. The court overruled the exception to the fourth finding and sustained that to the fifth finding. These rulings by the District Court were approved on appeal, and, as said, had never been disturbed. There was an adjudication of the facts of settlement then and that plaintiff did not comply with the condition that it should return to Richardson the collateral security held. In view of this situation, the design of plaintiff in pleading the settlement failed, and upon remand it sought to change its tactics by denying what it had before expressly pleaded and on which it had procured an adjudication. Such a practice of changing hold to meet emergencies can not be tolerated. *Zalesky v. Insurance Co., supra*. Moreover, there was no additional evidence received on the subject, and therefore no occasion to amend the pleadings to conform to the proof then adduced, and, after the issue had been fully adjudicated, it was too late to amend to conform

to the proof introduced on the original presentation. It was rather an attempt to avoid the effect of the referee's finding fully confirmed by the courts, and on the same evidence procure a different finding after remand. We are of the opinion that the court erred in permitting the plaintiff to withdraw the portion quoted from the original reply.

III. It will be observed, however, that, though Exhibit Seventy-Five was not admissible in evidence, it did form a part of the eleventh finding of the referee, and, basing his conclusion thereon, he declared

4. SAME:  
findings  
by court:  
construction:  
conflict.

\$213.32 to be owing the plaintiff. On the last hearing, that exhibit was proven to be a true copy of the account between Richard-

son and the bank from 1887 to 1898, inclusive, and as explained exhibited five notes as having been paid by the bank after April 30, 1894, the time of the settlement from the proceeds of collateral security held by the bank. As such payment was approved by this finding, the referee could not have intended by the fourth finding to hold that the settlement of April 30, 1894, was of all obligations of Richardson to the bank. Otherwise, his report is in the anomalous condition of finding the notes last mentioned included in the settlement in which the note of \$3,000 sued on was executed, and at the same time treating them as an offset to moneys of Richardson subsequently collected. Manifestly, the referee did not regard notes concerning which there appears to have been no controversy as matters of difference between the parties included in the settlement. This view is somewhat strengthened by testimony of the cashier and his assistant exhibited to the trial court on the last hearing, but not abstracted on appeal to the effect that upon the execution of the note of \$3,000 sued on three notes of \$1,000 each were delivered to Richardson. He denied this, but did not dispute the existence of such notes. While the findings are to be treated as special verdicts in ascertaining the meaning of the referee in each, they must

be construed with reference to one another, and, when so construed, we are of opinion that all existing notes of Richardson were not intended by the referee by the fourth finding to have been included in the settlement.

IV. It having been proven that plaintiff received some \$4,661.84 between April 30, 1894, and October 30, 1898, the burden of proof was on the plaintiff to satisfactorily account for this sum. On the former

5. EVIDENCE:  
books of  
account; oral  
explanation.

hearing it was content to do this by the introduction of a copy of its ledger account with Richardson. On the last hearing the

books of original entry were introduced. Appellant takes numerous exceptions to the preliminary proof; but, without reviewing those in detail, we have to say that the foundation for their introduction was sufficient. The business of a bank is to deal in moneys, checks, drafts, notes, and the like, and of necessity its accounts relate to such items. *Orcutt v. Hanson*, 70 Iowa, 604; *Young v. Jones*, 8 Iowa, 219. If the figures or abbreviations were not self-explanatory, oral evidence was admissible to indicate the meaning intended. *Bay v. Cook*, 22 N. J. Law, 343; *Wingate v. Mechanics' Bank*, 10 Pa. 104; *In re Fulton*, 178 Pa. 78 (35 Atl. 880, 35 L. R. A. 133), an exact copy of the items.

The following are charged to Richardson in different parts of the books:

1894.

May 4.	Rec'd mtg. ....	\$	.75
" 7.	Int. ....		24.
" 18.	Int. ....		12.
June 18.	Int. ....		20.
" 30.	8105 pd. ....		600.
Aug. 8.	Int. ....		15.
			24.
" 15.	Int. ....		45.55
Sept. 27.	Int. ....		20.

1894.		
Nov. 8.	Int. . . . .	24.
" 19.	Int. . . . .	12.
1895.		
Jan. 5.	'94. . . . .	20.
" 7.	'94. Coupon. . . . .	35.
Feb. 7.	Int. . . . .	24.
Mar. 9.	Int. . . . .	20.
May 7.	Int. . . . .	24.
" 27.	. . . . .	25.
June 10.	Note pd. . . . .	1,000.
Aug. 8.	. . . . .	24.
Sept. 21.	Int. . . . .	32.
Nov. 6.	Note and Int. . . . .	603.20
" 12.	Int. . . . .	24.
1896.		
May 8.	Int. . . . .	24.
July 20.	Atty. fees . . . . .	22.
" 22.	8190 pd. . . . .	393.30
Aug. 10.	Int. . . . .	24.
" 29.	Atty. fees. . . . .	30.
Nov. 10.	Int. . . . .	24.
1897.		
Feb. 8.	Int. . . . .	24.
May 5.	Int. . . . .	24.
1898.		
May 2.	Note pd. . . . .	1,200.
	Int. . . . .	71.20
Sept. 9.	1898. Recording mtg. . . . .	.60

It will be observed that the book entries are not sufficiently explicit to indicate what the items are, or that they are correct charges against the defendant; but the cashier of the bank testified that, under the system of bookkeeping followed by the bank, where figures merely were entered, these indicated the payment of cash on defendant's checks.

Though without personal recollection, he seems to have accepted an item of \$24 August 8, 1894, the same amount March 9, 1895, \$24, August 8, 1895, and testified these were for interest, as were all others noted as "int." The cashier also testified that "8105 pd." and "8190 pd." each referred to a note so numbered which had been paid, that he had no personal recollection of what any of the notes were, but could ascertain from a note register of the bank, and in his language: "8105, it was made on the 28th of April, 1892. The item that I refer to under date of November 6, 1895, No. 7732, was given on the 18th of August, 1891. The item I refer to in my direct examination, dated July 22, 1895, of \$393.30, note paid, is No. 8190, Sutton Dodge and Richardson note. I had that since August 22, 1892. That is the time it was taken. The item I spoke of on direct examination, May 2, 1898, \$1,200, was taken October 5, 1891. That is the time we acquired that note. That interest item of \$71.20, that I referred to May 2, 1898, is the interest on that \$1,200 note. . . . June 30, 1894, is our note No. 8105, which was made April 28, 1892, as I discover from looking at the loans and discounts of that date, and find No. 8105 charged up. The note charged June 10, 1895, No. 8023, was given March 8, 1892. . . . I find this by looking at the loans and discounts of that date. Richardson was given credit for the proceeds of that note on March 8, 1892. On November 6, 1895, note was paid for \$393.30, No. 7732. We took that note August 22, 1892. May 2, 1898, note paid, \$1,200. We took that note October 5, 1891, and interest charged \$71.20." The payment of the \$22 for attorney fees was sufficiently explained, but no showing whatever made as to the "\$30 atty. fees" or the recording fees. The item for attorney fee must have had reference to some payment to an attorney, a third person, as also each of those for recording fee, and the entries, as they appeared on the books, were not competent evidence to prove these. *Lyman v. Bechtel*, 55

Iowa, 437; *Snell v. Eckerson*, 8 Iowa, 284; *Brannin v. Voorhees*, 14 N. J. Law, 590. The same is true of the coupon, \$35. The witness explained that the entry meant that money had been paid out for an interest coupon to some third person, and, in the absence of any further showing, it ought not to have been allowed. Equally clear is it that the other items were on alleged notes held by plaintiff, and, insofar as computed on notes proven, should have been allowed. The evidence as to the notes on which the collections were applied was extremely unsatisfactory. Of course, the note register, as merely a memorandum and separately offered, was not admissible in evidence. *United States Bank v. Burson*, 90 Iowa, 191; *Security Co. v. Graybeal*, 85 Iowa, 543. But, as a part of the bank's system of accounts, and as explanatory of entries on the journal and other books, we see no reason for not introducing that kept by the bank in evidence. Certainly, had these notes been executed to the bank, the journal entries and those in the note register should have disclosed the facts. Indeed, the cashier testified that the books would do so, but no effort was made to prove these. Why such material evidence should have been withheld is unexplained. Whether any of these notes had been returned to Richardson with a pass-book was in dispute with the circumstances strongly favoring defendant's denial. The dates of the notes finally were given, but no evidence was adduced tending to show the times of their maturity, or, save as set out, to whom they were executed or by whom signed. It was fairly to be inferred from the evidence of the cashier, speaking from the books, that the \$393.30 note was executed by Richardson, and, as it appeared that credit was given to him for the proceeds of the \$1,000 note, it may be inferred that he executed it. The witness testified that other notes were taken, acquired or charged; but, aside from this, there was no proof that they were instruments on which the bank might apply the money of Richardson properly. No explanation

of the other entries as to notes was attempted, and the question we have to determine is whether the mere entries on bank journals in form as follows:

June 30, 1894.	8105 pd.....	\$ 600.
Nov. 6, 1895.	Note and Int.....	603.20
May 2, 1898.	Note paid.....	1,200.
Int. .	.....	71.20

—with no other evidence, save that these entries, meant notes paid, and of the date of each, will warrant the entry of a judgment thereon in its favor.

When books are received in evidence, they stand in an important sense as a witness or deposition in the case. *Mathews v. Herron*, 102 Iowa, 45. Their value as evidence

6. SAME:  
effect as  
evidence.

depends largely upon their condition and manner in which they are kept. *Christman v. Pearson*, 100 Iowa, 634. They certainly should be given no greater effect than the testimony of a witness with knowledge to precisely what the books contain. Suppose the cashier or other officer of the bank had testified to precisely what these books disclose—that is, that the bank had applied the amounts specified on notes of the date and amount specified, without more—would any one be warranted in concluding that Richardson was liable thereon? Were they executed by him to the bank? Did the bank pay them to some third person for him? Did they bear his signature, or did the bank charge him therewith because of his indorsement or guaranty, or were they notes paid to some one else? The record before us furnishes no answer to these inquiries, nor does it indicate in any way that the notes were proper charges against Richardson. While a book account, when received, is *prima facie* evidence of what it contains, as a general rule the charges therein, to establish liability alone, must be specific and particular. *Cummings v. Nichols*, 13 N. H. 420 (13 Am. Dec. 501);



*Corr v. Sellers*, 100 Pa. 169 (45 Am. Rep. 370); *Baldrige v. Penland*, 68 Tex. 441 (4 S. W. 565); *Cargill v. Atwood*, 18 R. I. 303 (27 Atl. 214). To omit any of the books of original entry throwing light on the items of charge is ordinarily a ground of suspicion at least. See *Larue v. Rowland*, 7 Barb. (N. Y.) 107. The entries, considered together, should identify the item charged, at least, and, in case of money paid for or applied on note or other written obligation, with such particularity as to show that it constituted a liability of the party against whom the entry had been made. This much is essential to safety in permitting books of account to supply *prima facie* evidence of the items entered therein.

Our conclusion is that the court should have rejected the charges as indicated above, and credited plaintiff with the remaining items only. The result, as is always the case when the character of the evidence suggests but falls short of proof, is not entirely satisfactory; but plaintiff, after having been afforded a second opportunity to account for money collected on notes held by it as collateral security, has failed in large part to do so. Decree may be entered in this court, or the cause may be remanded to the District Court for that purpose.—*Modified and affirmed.*

# INDEX.

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ACTIONS

TO

AGENCY

## ACTIONS. SEE PRACTICE.

**Certiorari: Contempt: Review of evidence.** *Certiorari* is not primarily for the purpose of reviewing the rulings of the trial judge, but is to determine whether the court acted without authority in making the order complained of; so that if there is competent evidence to support a judgment for contempt the order will be sustained regardless of the admission of other incompetent evidence. In contempt proceedings to punish defendant for selling or keeping for sale intoxicating liquors in violation of law, the evidence is reviewed and held sufficient to support conviction. *Russell v. Anderson*, 533.

**Certiorari: Rehearing: Costs.** On a rehearing in *certiorari* the cause must be submitted on the record as it stood at the former submission, although affidavits have been since filed, and such affidavits will be stricken at the cost of the party filing the same. *Lewis v. Brennan*, 585.

**ACCOUNTING.** See AGENCY—REAL PROPERTY.

**ACKNOWLEDGMENT.** See EXECUTION OF INSTRUMENTS.

**AGENCY.** See HUSBAND AND WIFE—INSURANCE.

**Brokerage contract: Construction.** A commission contract for the sale of land which provides that the broker will use his best efforts to find a buyer, and the owner will aid in every way possible, does not create an exclusive agency and deprive the owner of the right to sell; and upon a sale by the owner to a purchaser procured by himself the agent is not entitled to a commission. *Tracy v. Radeke*, 167.

**Brokers: Recovery of commission: Proof of service.** A broker cannot recover a commission for procuring a purchaser for property on proof simply that the purchaser overheard a conversation between the broker and another, thus learning that the property was for sale, and then without solicitation by the broker negotiated a purchase direct from the owner. *Monson v. Carlstrom*, 183.

## AGENCY Continued

**Same: Instruction.** One who contracts to procure a purchaser for property is not required to show an actual sale to recover his commission, when a sale was in fact made he must show that he procured the purchase and was thus instrumental in effecting the sale; and an instruction to that effect is held not misleading as requiring the broker to show more than procurement of the purchaser. *Idem*.

**Evidence.** A witness who has observed the manager of a company in the actual transaction of its business may testify to the fact of his agency. *Kimball Bros. Co. v. Gas Co.*, 632.

**Same.** Recognition of a contract made by an agent is sufficient proof of his agency and authority to make the contract. *Idem*.

**Fraud of agent: Accounting.** An agent is required to account to his principal for any profit he may have acquired from the transaction by concealment of facts which it was his duty to disclose to enable the principal to deal the most advantageously; and it is immaterial that the principal has lost nothing, but the accounting may be had if the agent derived the secret profit. *Leonard v. Omstead*, 485.

**Same: Proof of Agency: Evidence.** Agency arises out of a contract relation, but need not be proven by an express agreement, it may be inferred from the circumstances. In the instant case the evidence is held to show the relation of agency at a time when defendant arranged with the party with whom his principal was exchanging lands to derive a secret profit from the transaction, and he is held to account therefor. *Idem*.

**Principal and agent: Secret profit: Accounting.** An agent or confidential representative cannot secretly profit by the transaction but is required to account to his principal for all such profits, even though received in a transaction relative to the subject matter in excess of his authority, and this duty is not relieved by accounting for the full price at which he was authorized to make the sale of the property; so that where defendant, an owner with others of certain corporate stock, was appointed by them to complete a transfer of all the stock, including his own at a price agreed upon, each to pay his proportionate share of the expense, demanded and received of the purchaser as a condition precedent to delivery a large sum in addition to the agreed purchase price, he could not secretly retain the same as a commission but must account to his associates therefor. *Merrill v. Sax*, 386.

## AGENCY Continued

## TO

## APPEAL

**Same: Gratuitous agency.** The fact that an agent acts gratuitously does not relieve him from the obligation to account to his principal for all profits made out of the subject matter of his agency; but where one of several owners of corporate stock is appointed by them to close a sale of the whole, less than which the purchaser would not buy, at the expense of all in proportion to their interests, the agency is not gratuitous. *Idem.*

**Same: Compensation of agent.** The express agreement by which one of several owners of corporate stock is to have his expenses in closing a sale of their combined holdings, excludes the idea that he is to be compensated for his services; but even if he was entitled to compensation in addition to his expenses, that fact would not relieve him from the obligation to account to them for any sum received from the purchaser in addition to the agreed purchase price. *Idem.*

**Same: Fraud.** Although an agent for the sale of corporate stock demanded from the purchaser a sum in addition to the agreed purchase price, as a condition precedent to its delivery, and the purchaser knowing his rights yielded to the demand, it did not constitute a legal fraud. *Idem.*

**Principal and agent: Accounting.** Where one of several owners of corporate stock was authorized to complete a sale of all their interests and they united in paying his expenses incident thereto, a sum demanded and received by him from the buyer in excess of the agreed purchase price of the stock was in effect the price of its delivery, and should be accounted for to the several owners. *Idem.*

**APPEAL.** See DRAINAGE—JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS—WILLS.

**Appeal on certificate: Discretion.** The power of the trial court to certify that a cause involving less than one hundred dollars is one in which an appeal should be allowed should be exercised with discretion, and where the questions involved are not of such doubtful character as to call for an adjudication by the Supreme Court the appeal will be dismissed without a review of the record. *Wood & Sons v. Griffith*, 314.

**Direction of verdict: Review.** Upon reviewing a directed verdict the appellate court will adopt that view of the case most favorable to the unsuccessful party; and where from the whole evidence reasonable minds may differ as to the weight of the evidence, or inferences to be drawn therefrom, the con-

## APPEAL Continued

clusions will be held to be for the jury, and for the purposes of the appeal will be resolved in favor of the unsuccessful party. In re Estate of Kern, 620.

**Evidence: Presumption.** In so far as there is a conflict in the evidence the version of the successful party will be taken as true on the appeal. Kirkpatrick v. Ins. Co., 74.

**Findings of lower court: Presumption.** Where there is no abstract of the evidence it will be presumed on appeal that the findings of fact by the trial court were justified. Distilling Co. v. Price & Co., 169.

**Judgments: Presumption as to validity.** Where no reason appears that the judgment of a justice was invalid, and the only proper ground on which the district court on appeal could have discharged the garnishee under the judgment was that the debt was exempt to defendant, it will be presumed on appeal to the supreme court that the district court properly held the judgment valid. Simmons v. Dolan, 177.

**Notice.** Notation on the appearance docket by the clerk of the return of service of an original notice showing who of the parties have been served, and the manner and time of service, is not necessary to charge an appealing party with notice as to what parties are entitled to notice of appeal. In re Will of Downs, 268.

**Parties: Variance: Objection not urged below.** Where the parties in an action against a partnership alleged to consist of certain persons proceed to trial without impleading another disclosed by the evidence to be a member of the firm, the variance between the pleading and the proof is not such that the answering defendants can urge it on appeal to defeat the action. Distilling Co. v. Price & Co., 169.

**Questions not raised below: Review.** Where the trial court's attention was not called to the failure of plaintiff, in a personal injury action to establish his freedom from contributory negligence, except by a general statement that the verdict was contrary to the evidence, the subject will not be reviewed on appeal, Johnston v. Ry. Co., 114.

**Review of instructions: Presumption.** Where the abstract on appeal contains none of the evidence, it will be presumed that the instructions which are a correct statement of the law had support in the evidence. Monson v. Carlstrom, 183.

APPEAL Continued

TO

CARRIERS

**Service of notice: Necessary parties.** In an action by a judgment creditor to set aside a deed as void for want of consideration, or as being in fraud of creditors, and to subject the property to the satisfaction of his judgment, the grantor while a proper party is not a necessary party to an appeal, and failure to serve him with notice will not deprive the appellate court of jurisdiction. *Wescott v. Sioux City*, 453.

**ARGUMENT.** See NEW TRIAL.

**ASSUMPTION OF RISK.** See NEGLIGENCE.

**ATTACHMENT.**

**Attachment by garnishment: Discharge: Appeal.** Where judgment is rendered against an attaching plaintiff he must forthwith announce his intention to appeal and perfect the same within two days or he will lose all rights under the attachment; and this rule applies to attachment by garnishment. *Conkling v. Young*, 676.

**BANKRUPTCY.**

**Recovery of preference: Evidence.** It is incumbent on a trustee in bankruptcy to show that he has not sufficient assets in his hands to pay the claims filed and allowed against the bankrupt before he can recover a preference made by him; and as evidence of that fact he may introduce the schedule of claims filed and allowed by the referee. *Cree v. Bank*, 232.

**Same: Proof of another action pending.** Evidence that a trustee in bankruptcy had instituted an action against the purchaser of his property for its value, is not admissible in defense of another action by the trustee against the party to whom the proceeds were paid as an alleged preference; as one action is not dependent upon the other. *Idem*.

**BILLS AND NOTES.** See NEGOTIABLE INSTRUMENTS.

**BONDS.** See SURETYSHIP.

**BOUNDARIES.** See REAL PROPERTY.

**BROKERS.** See AGENCY.

**CARRIERS.** See RAILROADS.

**Express companies: Delay in shipment: Special damages.** Where an express company had notice at the time of shipping

## CARRIERS Continued

## TO

## CONTRACTS

a shaft for a steam shovel outfit that the outfit had broken down, and that it and the crew of men operating the same would remain idle until the shaft was received, the company, if negligent, was liable in damages for the actual rental paid by plaintiff for the use of hired machinery, the fair rental for the use of his own machinery, and the wages actually and necessarily paid the workmen. *Elzy v. Adams Express Co.*, 407.

**Same: Notice.** Where the shipper informed the agent that he was shipping an iron shaft of considerable weight by express rather than by freight to save time, that a steam shovel outfit had broken down and that it and the crew would be idle until the shaft was received, the notice was sufficient to apprise defendant that special damages would result to plaintiff if shipment was delayed. *Idem*.

**CERTIORARI.** See ACTIONS—INTOXICATING LIQUORS.

**CHANGE OF VENUE.** See PRACTICE.

**CHATTEL MORTGAGES.**

**Private sale of property: Conversion.** Where a chattel mortgagor turned over the property to the mortgagee for the purpose of sale and satisfaction of the mortgage note, and it did not appear that the property sold at private sale exceeded the amount of the debt, or that fraud was practiced by any of the parties, the mortgagee was not liable to judgment creditors of the mortgagor for conversion of the property, even though the mortgage was unrecorded and was not foreclosed. *Jordan Co. v. Sperry Brothers*, 225.

**COMMISSIONS.** See AGENCY.

**CONDEMNATION OF PROPERTY.** See REAL PROPERTY.

**CONTEMPT.** See ACTIONS.

**CONSTITUTIONAL LAW.** See COURTS.

**CONTRACTS.** AS AFFECTING REAL PROPERTY—See REAL PROPERTY.

**Action for services: Quantum meruit: Evidence.** In a suit on *quantum meruit* for services a witness may testify to the reasonable value of the services he saw plaintiff perform, and to the going wage at the time and place for similar labor. *Allen v. Urganden*, 280.

## CONTRACTS Continued

**Same.** Where defendant in a suit for wages testified to a special contract at a certain price per day and that he had paid plaintiff at that rate for all the days he had worked, which was admitted, there was no prejudice in excluding the further inquiry as to whether defendant had paid him in full for his services, as the subject had already been fully covered. *Idem.*

**Same.** Evidence reviewed and held to sustain a verdict for plaintiff in a suit for the reasonable value of services, as against the contention of defendant that the work was performed under an express agreement as to *per diem*. *Idem.*

**Breach of contract: Evidence: Result of experiment.** In a damage action for failure to furnish electrical power as agreed to operate plaintiff's elevator, in which the plaintiff claimed that the trouble was with plaintiff's motor to which the power was applied, the court in its discretion properly admitted evidence of the result of a test of the motor, shown to have been made under practically the same conditions as when installed in plaintiff's plant. *Kimball Bros. Co. v. Gas Co.*, 632.

**Same: Evidence.** Under defendant's claim, in an action for failure to furnish electrical power as agreed, that plaintiff, knowing defendant's system, furnished a motor which was not adapted to its current and it appearing that the motor had been tested, the testimony of an electrical engineer as to the inadaptability of the system to the motor furnished was admissible. *Idem.*

**Breach of contract: Evidence.** In the instant breach of contract case the evidence is held sufficient to support a finding that defendant agreed to furnish a certain voltage of electricity for plaintiff's motor. *Idem.*

**Same: Damages: Recovery.** The general rule is that a party who has suffered damage by reason of a breach of contract can recover only such damages as naturally arise from the breach, or such as may have been within the reasonable contemplation of the parties as the probable result of a breach; and it is the duty of the injured party to use reasonable diligence to minimize the damage, and he can not recover that which he might have avoided by the exercise of ordinary care and reasonable expense. *Idem.*

**Same: Contract for electrical power: Breach: Damages.** Defendant contracted to supply plaintiff with certain electrical power to operate its elevator but was unable to do so because its current was not adapted to plaintiff's motor. Defendant for about a



## CONTRACTS Continued

TO

## CONVEYANCES

year attempted to overcome the difficulty but failed and abandoned further efforts, and thereafter for the space of two years plaintiff accepted and paid for such power as it could furnish, when it changed its system and was able to furnish the current contracted for. *Held*, that plaintiff was only entitled as damages to the difference between the rental value of its buildings with the current as supplied and their rental value had the contracted current been supplied, up to the time defendant abandoned efforts to furnish the agreed current; and for a reasonable time thereafter in which to change the system so as to get the required power, together with the reasonable expense of making the change, and not the difference in rental value up to the time defendant changed its system. *Idem*.

**Constitutional questions: Decisions of federal courts as authority: Sale of liquor: Statutes.** Our State court is not bound by any provision of the federal constitution to follow a decision of the supreme court of the United States in passing upon the validity of a state statute, further than to recognize the obligation not to enforce a statute in violation of the constitution; but where the supreme court of the United States has held a statute constitutional, in contravention of a prior decision of the State court, and no property right has been acquired in reliance upon the decision of the State court, it will reverse its ruling to conform with that of the federal court; as where the State court held the statute prohibiting any person from soliciting orders for the purchase of liquor to be shipped by a nonresident direct to the purchaser as unconstitutional, because in conflict with the interstate clause of the federal constitution, which was subsequently held not unconstitutional in that respect by the federal court, the State court will overrule its prior decision so far as to restrain one from soliciting such orders. Overruling *State v. Hanaphy*, 117 Ia., 15, and *State v. Bernstein*, 129 Ia., 520. *McCollum v. McCaughy*, 172.

**Same.** While an unconstitutional statute is invalid from the time of its enactment; still a decision holding a statute unconstitutional may be overruled, thus rendering the statute effective because of the removal of the supposed objection. *Idem*.

## CONVEYANCES.

**Deeds: Delivery: Evidence: Dower.** The delivery of a deed is largely a question of intent to be gathered from all the facts and circumstances. On an issue as to delivery of a deed executed by grantor prior to his marriage, the evidence is re-

## CONVEYANCES Continued

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## CORPORATIONS

viewed and held insufficient to show delivery until after his marriage, and that his widow was therefore entitled to her dower interest in the land so conveyed. *Brown v. North*, 215.

**Deeds: Reservation: Exception: Distinction.** A reservation in a deed of conveyance is the creation of a new right issuing out of the thing granted in favor of the grantor only, which did not exist as an independent right before the grant, and in the absence of words of inheritance continues only for the life of the grantor; while an exception is a clause withdrawing from the conveyance some part of the thing granted which otherwise would have passed to the grantee. *Stone v. Stone*, 438.

**Same.** A deed conveying in trust the entire estate in lands, except certain designated timber, which was reserved for the use and benefit of a third person, is held to be an exception of the timber from the grant rather than a reservation of part of the estate granted, and that the entire estate in the land passed to the trustee. *Idem*.

**Reference to plats: Effect.** Where lands are conveyed according to the official plat of a survey thereof, the plat and all its notes, lines, descriptions and landmarks become a part of the conveyance the same as though such descriptive features were written out therein, and are controlling so far as the limits of the tract are concerned. *Barringer v. Davis*, 419.

**Same: Description: Natural objects: Course and distance.** Where the description in a deed refers to natural objects, as a lake shore, or even a marked line, they will control both course and distance and carry all the land within their boundaries though much greater in quantity than that mentioned. *Idem*.

**CONVERSION.** See CHATTEL MORTGAGES.

**CORPORATIONS.**

**Organization: Unauthorized acts of promoters: Fraud.** The promoters of a corporation occupy a fiduciary relation to the company and are required to act in the utmost good faith respecting any matter affecting the financial interests of the corporation, with the fullest disclosure of all the facts. Under this rule they can not purchase land on their own account as agents and sell it to the corporation at a profit unless the transaction is fully disclosed and consented to. *Caffee v. Berkley*, 344.

**Same: Notice of fraud.** Where the promoters of a corporation

## CORPORATIONS Continued

TO

## CRIMINAL LAW

are acting in their own interest and antagonistic to the corporation they represent, their knowledge of the transaction is not chargeable to the corporation. *Idem.*

**Same: Limitation of action.** An action against the promoters of a corporation to recover a secret profit derived by them at the expense of the corporation is solely cognizable in equity; and the statute providing that a cause of action for fraud shall not be deemed to have accrued until the fraud is discovered applies. *Idem.*

**Same.** The mere recording of a deed is not notice of the price paid for land unless there is some obligation to examine the record to ascertain the price paid. *Idem.*

**Fraud: Notice.** While the means of acquiring knowledge of fraud is ordinarily the equivalent of actual knowledge, still knowledge of fraud incidentally acquired by the officers of a corporation when not acting in an official capacity is not notice to the corporation. *Idem.*

**Contract by agent: Proof of authority.** Where a company undertakes to perform a contract made by its managing officer, thus ratifying the contract to that extent, no showing of previous authority of the officer to make the contract is necessary to bind the company. *Kimball Bros. Co. v. Gas Co.*, 632.

**Execution of instruments: Personal liability.** One who signs an instrument as president of a corporation, and not in his individual capacity, is not personally liable thereon; and the allegations of the petition as to personal liability will control the mere recitals of the record as to the exhibit from which it might be inferred that he signed as maker, describing himself as president. *Pease v. Globe Realty Co.*, 482.

**COUNTIES.** See **POOR PERSONS.**

**CREDITORS SUITS.** See **EQUITY.**

**CRIMINAL LAW.**

**False pretense: Indictment: Description of person defrauded.**

In charging a crime all the facts which are necessary to constitute a complete offense must be stated, so that the accused may be advised of the nature of the case it is proposed to make against him; and in charging the crime of obtaining money or property by false pretense the name of the party whose property rights have been invaded must be expressly averred

## CRIMINAL LAW Continued

and not left to inference. The indictment in the instant case is held defective in this respect. *State v. Clark*, 297.

**Same: Evidence.** The record of an unsatisfied mortgage is not sufficient to disprove the truthfulness of a grantor's representation that the land was unincumbered by mortgage liens; and where there was no other evidence than that of the county recorder that the original instrument was not in his possession or under his control, there was no proper foundation for admission of the record as secondary evidence of the fact that the mortgage was unsatisfied, even if competent. *Idem*.

**Flight: Rights of accused admitted to bail: Evidence.** While ordinarily an accused who has given bail may go where he chooses if his bondsmen do not object, still the fact that he has given bail will not preclude proof of flight, if to avoid or retard prosecution. Evidence held to show that defendant admitted to bail fled to retard or avoid prosecution. *State v. Hetland*, 524.

**Rape: Corroboration.** There must be some evidence corroborating the prosecutrix and tending to connect the defendant with the commission of the offense, to justify conviction for assault to commit rape, but its sufficiency is a question for the jury. *Idem*.

**Same.** The denial by a defendant charged with assault with intent to commit rape that he used any force is ground for the inference that he attempted to have intercourse with prosecutrix and would tend to connect him with the offense, even though not corroborative of her claim that force was used; and the flight of defendant knowing that he was charged with the crime would tend to connect him therewith. *Idem*.

**Same: Flight: Instruction.** An instruction that if defendant, knowing he was accused of the crime of assault with intent to commit rape, fled to retard or avoid prosecution the fact of his flight should be accepted as evidence tending to connect him with the offense, was not objectionable as ignoring his claim that he did not flee because of the accusation. *Idem*.

**Instruction: Reasonable doubt.** An instruction that if the jury found beyond a reasonable doubt that the crime of assault with intent to commit rape was committed by some one, that if defendant was the person making the assault, and that he did so with intent to have sexual intercourse with prosecutrix against her will he should be convicted, was not objectionable as failing

## CRIMINAL LAW Continued

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## DRAINAGE

to require a finding beyond a reasonable doubt that defendant was the assailant and that he intended to commit the crime of rape, where the jury was plainly told that unless proof thereof was beyond a reasonable doubt he should not be convicted of the crime charged. *Idem*.

**COSTS.****Security for costs: Filing of proofs: Withdrawal of motion.**

A defendant in moving that plaintiff be required to give security for costs must present all his proofs with the motion, and he cannot withdraw his motion and refile it with the same and additional affidavits, at least without showing good cause; and when so withdrawn and refiled without leave of court it was not an abuse of discretion to strike it from the files. *Beans v. Denny*, 52.

**CUSTOM.** See NEGLIGENCE.**DAMAGES.** See CONTRACTS—HIGHWAYS—HUSBAND AND WIFE—MUNICIPAL CORPORATIONS.

**Rental value.** The owner of machinery may recover damages for its rental value when deprived of its use through the fault of another, upon proof of the value of its use, although it is not shown that the same had a rental value.—*Elzy v. Adams Express Co.*, 407.

**When not excessive.** Two thousand five hundred dollars damages is held not excessive for injury to a woman forty-nine years of age and in previous good health, where she was confined to her bed for three months, incapacitated for her work and suffered pain and permanent disability. *Krisinger v. City of Creston*, 154.

**DEEDS.** See CONVEYANCES.**DISCREPANCY IN NAMES.** See EXECUTIONS.**DOWER.** See REAL PROPERTY.**DRAINAGE.**

**Assessment of benefits: Appeal: Service of notice.** On appeal from an order of the supervisors fixing an assessment of benefits for drainage purposes, the notice must be served on the first four petitioners for the drain, and upon service of notice upon the county auditor only, the appeal should be dismissed. *Poage v. Grant Twp. Ditch*, 510.

## DRAINAGE Continued

**Assessment of benefits: Railway lands: Notice: Appeal: Statutes: Constitutionality.** The Act of the 30th General Assembly relating to the assessment of benefits for drainage purposes provides a separate and distinct method for the assessment of railroad lands from that provided for agricultural lands, and does not contemplate that railroad lands shall be classified in tracts of forty acres or less; and express provision is therein made for notice to railway companies of the assessment and for the right of appeal, so that the act is not unconstitutional for failure to so provide in either respect. In *re Johnson Drainage Dist.*, 380.

**Same: Assessment of railway lands: Benefits: Presumption.**

An assessment for drainage purposes can only be made for actual benefits, but a presumption obtains in favor of an assessment and the burden is on the party attacking it as excessive and disproportionate to establish the claim; and where the evidence fairly tends to show that the assessment of railroad lands is not in substantial excess or out of proportion to that of other lands in that district, it will not be disturbed. *Idem.*

**Construction of ditch: Injury to adjacent land: Liability of contractor.** In excavating a drainage ditch in a district established by public authority the contractor is required to use reasonable care to avoid injury to adjacent lands; but he is not liable for injury the natural result of carrying the plan of drainage into execution. *Fitzgibbon v. Dredging Co.*, 328.

**Same: Means employed for excavating.** In constructing a public drainage ditch the contractor may employ the means and method of excavation usually and generally approved for that kind of work, where there is no provision otherwise in the contract. *Idem.*

**Same.** Where the plan of a public drainage ditch cuts across the course of a stream, but there was no provision of the contract requiring the contractor to take care of surplus water by means of a dam or by-pass, he was not liable for injury to adjacent lands on account of overflow from the ditch of water naturally accumulating therein, where he followed the plan furnished, used the usual machinery for such work and by no act or omission of his own increased the flow. *Idem.*

**Joint action of county boards: Appeal: Notice: Jurisdiction.**

Upon an appeal from the action of the boards of supervisors relating to the establishment of a drainage district extending into two or more counties, and respecting a matter concerning which

## DRAINAGE Continued

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## ELECTIONS

the several boards are required to act jointly, the notice must be served upon the auditor of each county into which the district extends; and when served upon the auditor of only one of the counties the court does not acquire jurisdiction. In re Appeal of Head, 651.

**Same: Record of board proceedings.** Mere failure of the auditor to keep a record of the proceedings relating to the establishment of a drainage district in a separate drainage record book will not invalidate the proceedings. *Idem.*

**Surface water: Permanent and temporary injury.** Although a railway bridge and embankment may be of a permanent character, the injury caused thereby from damming the water and flooding adjacent land is not necessarily of a permanent character, but may be temporary or intermittent. Hughes v. Ry. Co., 273.

**Same.** Where the structure was not upon plaintiff's land but over a stream passing through the same, he was in no manner required to take notice of the method of its construction; nor could he anticipate injury by reason of its insufficient capacity, but his damage occurred whenever, it obstructed the flow of the stream causing it to overflow his land, and was not permanent but temporary or continuing; and he might elect to so treat it, and the recovery of damages for one or more invasions was not a bar to an action for subsequent similar injuries. *Idem.*

**Same: Instruction.** Where there was evidence to support the jury's finding that plaintiff's injury was due to the obstruction of the stream by defendant's bridge and embankment, there was no occasion to instruct the jury concerning the measure of plaintiff's recovery in case it should be found that the injury was caused in whole or in part by another insufficient waterway or obstruction. *Idem.*

## ELECTIONS.

**Refusal to certify nomination: Remedy.** The courts have no jurisdiction of questions relating to the validity of certificates or nomination papers of candidates for state office; the statutes create a tribunal consisting of the Secretary of State, Auditor of State and Attorney General whose determination of such questions is final, and where a candidate is aggrieved with the action of the Secretary of State in refusing to accept his nomination papers as valid, his remedy is to file his objection thereto as provided by statute and thus secure a hearing before that tribunal; and where no objection to the action of the Secretary of State in

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refusing to file nomination papers is made his action becomes final. *Pratt v. Secretary of State*, 196.

**Primary nominations: Authority of party committee.** The primary law for the nomination of candidates by direct vote is mandatory, and in the first instance all nominations required to be made must be made in that manner; it is only where there has been a regular nomination by direct vote and for some reason a vacancy has occurred that a party committee may act in the premises. *Idem*.

**ELECTION OF REMEDIES.** See EQUITY—FRAUD.

**EMINENT DOMAIN.** See REAL PROPERTY.

## EQUITY.

**Action to quiet title: Allegation of title.** An action to quiet title cannot be based on a claim that there is no ownership of the property in anyone, but the plaintiff must allege some title or interest, legal or equitable, in himself. *Doty v. Cedar Rapids*, 666.

**Creditors suits: Failure to make discovery: Remedy.** The remedy for failure of defendants, in a proceeding auxiliary to execution, to make such answers as the court may direct is not a motion to strike the answers from the files, but a motion to require full and implicit discoveries by process for contempt; but the matter of striking a pleading is so much within the discretion of the trial court that generally an appeal will not lie from the ruling. *Jordan Co. v. Sperry Brothers*, 225.

**Creditors suits: Garnishment: Res judicata.** A judgment creditor in garnishment proceedings is bound by a judgment in favor of the garnishee, and cannot relitigate the matter in a subsequent action to subject property of the debtor to the satisfaction of the judgment. *Idem*.

**Election of remedies: Garnishment: Equitable proceedings.** Judgment creditors who have pursued their garnishment proceedings no farther than to notify the garnishees, have made no such election of remedies as to preclude them from maintaining an equitable action against both parties and the property. *Idem*.

**Exchange of property: Rescission: Equitable relief: Evidence.** A party who is entitled to rescind an executed contract for the exchange of lands may have a judgment for reconveyance of the



## EQUITY Continued

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## ESTATES OF DECEDENTS

land, or for its value, conditioned on a reconveyance of the land received by him free from incumbrance; but courts of equity are not bound by any fixed rule and may adopt such relief as is suited to the particular circumstances: as in the instant case plaintiff is awarded judgment for the value of the land conveyed by her less the amount of incumbrance placed upon the land received and defendants are awarded a reconveyance of their land subject to the incumbrance. *Campbell v. Moorehouse*, 568.

**Laches.** A plea of delay in bringing an action to have a deed declared a mortgage will not avail where the parties were brothers, dealing together in other matters, and the grantor's indebtedness to the grantee had not been paid. *Veeder v. Veeder*, 492.

**Reformation of instruments: Mutual mistake: Evidence: Recovery of payment.** Where the purchaser of property contracted to pay an agreed price therefor, by assuming a mortgage and paying taxes in stated amounts as part payment and the balance in cash, but after making the cash payment discovered that the mortgage and taxes amounted to more than the sum agreed upon, he was entitled to have the contract reformed on the ground of mutual mistake and to recover the overpayment on the taxes and mortgage, even though the contract was superseded by a deed to the property and an action at law for the overpayment might have been maintained, no objection to the form of the action having been made. *Ragsdale v. Turner*, 604.

**EQUITABLE LIENS.** See FRAUD—MORTGAGES.

**ESTATES OF DECEDENTS.** See HOMESTEADS.

**Descent and distribution of estates: Rights of heirs: Estoppel.**

As a general rule property rights created by estoppel are superior to the statute of frauds and the statutory provisions with reference to wills and conveyances of real and personal property; so that where a decedent having no issue called his wife and mother to his bedside just prior to his death and stated to them that he desired his wife to have all his property, to which the mother consented, and he therefore made no will or formal transfer of the property, the mother was estopped to claim any interest in the property under the statutes of descent. *McDowell v. McDowell*, 286.

**Executors report: Amendment: Consideration.** An amendment to an executor's report filed on the day the case is submitted,

ESTATES OF DECEDENTS Continued TO EVIDENCE

which is denied and there is no evidence to support it, will not be considered. In re Estate of Duncanson, 564.

**Inventory of Estates: Duty to file.** An executor is required by statute to file an inventory of the estate before he is discharged, and it is the duty of the court to order him to do so irrespective of who makes the complaint. *Idem.*

**ESTOPPEL.** See ESTATES OF DECEDENTS—REPLEVIN—RAILROADS—REAL PROPERTY—TAXATION.

**EVIDENCE.** In Criminal Cases. See CRIMINAL LAW. See also RAILROADS—CONTRACTS.

**Admissions: Pleadings as Evidence of.** Pleadings which have been superseded may be offered in evidence for the purpose of establishing admissions of the party, but such evidence is not conclusive and when explained may go to the jury for what it is worth. McClure v. Accident Ass'n, 350.

**Admission of evidence: Harmless error.** Error in striking evidence which is afterwards received more in detail is harmless. Johnston v. Ry. Co., 114.

**Same.** Reversal of a cause will not be ordered because of the admission of immaterial evidence which is in no manner prejudicial. Cree v. Bank, 232.

**Exclusion of evidence: Prejudice.** Where the answer of a witness on cross-examination was confusing and his redirect examination did not clear the confusion, its exclusion as leading and suggestive was not prejudicial, especially as no further attempt to examine the witness on the subject was made. Allen v. Urganden, 280.

**Books of account: Oral explanations.** Where proper foundation has been laid for the introduction of books of account oral evidence is admissible to explain figures or abbreviations which are not self-explanatory. Bank v. Richardson, 738.

**Same: Effect as evidence.** Books of account when offered in evidence stand in an important sense as a witness or deposition in the case, and their value as evidence depends largely upon their condition and the manner in which they have been kept; and as a general rule charges therein, to establish liability, must be specific and particular. Bank books showing debit and credit items between the parties are held insufficient to show that the bank had accounted to defendant for certain moneys collected. *Idem.*

## EVIDENCE Continued

**Communications with a decedent.** In seeking to establish title to a decedent's land under an oral contract, the party claiming the benefit of the contract is disqualified from testifying to personal communications made to him by decedent; but the stepfather of plaintiff is held, on rehearing, competent to testify that decedent promised him to give plaintiff the land on certain conditions. *Boeck v. Milke*, 713.

**Credibility of witnesses: Statement of court: Effect.** A statement of the trial court that he believed two witnesses testifying adversely to each other concerning a state of facts were both honest in their statements and equally credible in character, did not amount to a finding that the evidence was in equipoise on the disputed question, so as to invalidate a conclusion in favor of one contention which had support in the other circumstances of the case. *Elzy v. Adams Express Co.*, 407.

**Declarations of present pain.** Declarations of present pain by a plaintiff in a personal injury action are admissible as tending to prove the existence of such pain; and an objection that the same are incompetent, irrelevant and immaterial does not comprehend an objection that the same were made as self-serving declarations. *Johnston v. Ry. Co.*, 114.

**Depositions: Waiver of objection.** A party who acquiesces in the offer of a deposition in evidence waives any objection there might have been to the custody, preservation and notice of filing the same. *McClure v. Accident Ass'n*, 350.

**Opinion evidence.** Where a witness had already stated that he did not think plaintiff as badly injured as she testified, refusal to permit him to further explain how she might unconsciously have testified falsely as to the extent of pain suffered from an injury was not erroneous; especially as the witness had not shown any knowledge on the subject inquired about. *Johnston v. Ry. Co.*, 114.

**Evidence of value.** The price paid for land several years previous and upon which valuable improvements have since been made is not competent in determining its present value. *Beans v. Denney*, 52.

**Same.** One may testify to the reputed wealth of a person in a community in which he has lived long enough to establish a reputation in that respect, although his residence there was temporary; but if the witness discloses a lack of knowledge on subsequent cross-examination the remedy is a motion to strike. *Idem*.

EXECUTIONS

TO

EXECUTION OF INSTRUMENTS

**EXECUTIONS.**

**Execution sales: Unrecorded instruments: Notice.** A purchaser at an execution sale who acquires no interest in the property by the sale, can not claim the protection of the statute against the effect of an unrecorded instrument of which he had no notice. *Witmer v. Shreves*, 496.

**Same: Discrepancy in names.** Where the title to property stood in the name of Lena B. Reeves a sale thereof under a judgment against Belle Reeves would not pass title, in the absence of any proof of identity. *Idem*.

**Execution sales: Action to redeem.** Mere inadequacy of price is not ground for interference by a court of equity with the statute limiting the time of redemption from an execution sale, but relief may be granted against a sheriff's deed in such cases because of mistake preventing redemption within the statutory time. *Tharp v. Kerr*, 26.

**Same.** A debtor can not set aside a deed on execution sale because of mistake preventing redemption, where there was another execution sale of the property on a later date, and neither an averment in his petition that he was misled as to the time for redemption from such later sale, nor that he offered to redeem therefrom prior to issuance of a deed. *Idem*.

**Same: Tender of redemption.** After issuance of a sheriff's deed on execution the clerk of courts has no power to accept redemption, and a tender to him is unavailing for that purpose; but as a basis for an equitable action to redeem the debtor should notify the holder of the deed of his claim of right to redeem and tender to him the amount necessary therefor. *Idem*.

**Same: Redemption: Extension of time.** The statutory right to redeem from a sheriff's sale on execution must be exercised within the time prescribed; the courts have no discretion or power to extend the time as an act of mercy. *Idem*.

**EXECUTION OF INSTRUMENTS. See CORPORATIONS.**

**Acknowledgment: Denial of genuineness of signature.** Upon the acknowledgment of the execution of an instrument before a notary it becomes immaterial whether the signature was affixed by the grantor personally or by another; so that denial merely of the genuineness of the signature is insufficient to overcome the weight to be given the certificate. *Gribben v. Clement*, 144.

EXCHANGE OF PROPERTY

TO

FRAUD

**EXCHANGE OF PROPERTY.** See EQUITY.**EXPRESS COMPANIES.** See CARRIERS.**FALSE PRETENSE.** See CRIMINAL LAW.**FAMILY EXPENSES.** See HUSBAND AND WIFE.**FORFEITURE.** See PARTNERSHIP—REAL PROPERTY—SALES.**FLIGHT OF AN ACCUSED.** See CRIMINAL LAW.**FRAUD.** See AGENCY—CORPORATIONS—PARTNERSHIP.**Fraudulent conveyances: Notice to creditors: Burden of Proof:**

**Evidence.** No transfer of personal property where the vendor retains the actual possession is valid, as against existing creditors without notice, except by a written instrument signed, acknowledged and recorded as provided by Code, section 2906: and the burden of proving actual notice to creditors is upon those claiming by virtue of the alleged transfer. Evidence held to show that a claimed transfer of a stock of drugs by a son to his father, in satisfaction of a mortgage indebtedness, was with the intent to hinder and delay plaintiff in the enforcement of a claim for injuries resulting from a careless sale of drugs. *Rankin v. Stultz*, 681.

**Same: Action to enforce judgment: Equitable lien.** The commencement of an equitable action to subject property to the satisfaction of a judgment, and service of notice with a copy of the petition on the person holding or controlling the property, creates a lien which is sufficient basis for an application of Code, section 2906, relating to the transfer of personal property. *Idem*.

**Same: Election of remedies.** A judgment plaintiff is not confined in the enforcement of the judgment to the legal remedy of levying an execution upon property subject to a mortgage, but may challenge both the mortgage and a pretended transfer of the property, if he so elects, by an equitable action under the statute; and in bringing such action is not required to give bond. *Idem*.

**Same: Prior liens: Application of payments.** Where a son gave his father a mortgage upon his stock of goods and thereafter sold the stock to him in satisfaction of the mortgage, retaining, however, the possession and management of the business, upon the setting aside of the sale at the suit of a judgment

**FRAUD Continued**

creditor of the son, the amounts drawn from the business by the son while in possession for his father, as contended, were properly credited by the court on the mortgage indebtedness, in the absence of proof that they were used for any other purpose. *Idem.*

**Fraudulent conveyances: Creditors' suit.** A city in exercising its option to repurchase land conveyed to a corporation for the purpose of erecting and maintaining a public library, becomes a purchaser as to the amount paid in excess of its claims against the corporation, and not a mere creditor; and where it knew or had reason to believe that the corporation was seeking to hinder and delay other creditors in making the conveyance, it took the property in excess of its claims as trustee and subject to the demands of the other creditors. In the instant case it is held that the city knew of the plaintiff's judgment against the corporation and that its officers had either actual or constructive knowledge of the purpose to defraud. *Wescott v. Sioux City*, 453.

**Fraudulent conveyances: Intent of parties.** The intent with which a conveyance is made is immaterial so far as creditors of the grantor are concerned, if it does not in fact hinder and delay them in the collection of their claims. *Veeder v. Veeder*, 492.

**Husband and wife: Fraudulent conveyances.** A wife who is a creditor of her husband may take a valid conveyance from him of property in satisfaction of his debt, unless in doing so she participates in his intent to defraud other creditors; but if she purchases with knowledge of his fraudulent intent, no matter what her purpose may be, she is not a good faith purchaser. *Carr v. Way*, 245.

**Same: Consideration: Burden of proof.** The relation of debtor and creditor does not exist when a wife permits her husband to take and use her property for the benefit of the family with no agreement to pay her therefor, and a conveyance of property to her in consideration therefor is voluntary and void as against other creditors of the husband; and in such cases the burden is upon the wife to show that the husband had other property sufficient to pay his debts. *Idem.*

**Same: Transactions between husband and wife.** Courts will scan transactions between a husband and wife closely where the rights of creditors are involved. *Idem.*

**Misrepresentation in sale of land: Instructions.** Where the evidence for plaintiff in an action for false representation in

## FRAUD Continued

## TO

## HIGHWAYS

the sale of land tended to show that the farm sold was of irregular shape and contained but about sixty acres of tillable land, with a much larger quantity rough and unfit for cultivation; that it surrounded on three sides tillable land of another; that defendant represented his land as containing two hundred and twenty acres of tillable land and pointed out that of the other as a part of his own, a charge that if defendant with intent to defraud pointed out the land of the other and represented it to be his own, and his farm with the other contained two hundred and twenty acres of good farming land; or, if without pointing out the land of the other he falsely stated that his own farm contained that quantity of tillable land he could recover, did not present inconsistent theories, as the gist of the fraud charged consisted in the false statement as to the acreage of his own farming land, and the pointing out of the other land was not an essential element in plaintiff's case, although competent evidence of the fraud. *Vaupel v. Mulhall*, 365.

**Same: Evidence: Value of property taken in exchange: Damages.** In an action for false representations in the sale of land, where the consideration therefor was in part an exchange of other property, and there was a conflict in the evidence as to whether the false representations were made, and the plaintiff pleaded and testified to the alleged consideration paid by him, the defendant was entitled to show the actual value of the property taken in exchange; and such evidence of consideration should be considered with that of plaintiff, not only on the question of whether defendant relied on the alleged representations, but as to whether they were in fact made; and this rule would not affect the amount of plaintiff's damages, as he could show the value of the land if it had been as represented and recover on that basis. *Idem*.

**GARNISHMENT.** See ATTACHMENT—EQUITY.

**GRAND JURY.** See JURORS.

## HIGHWAYS.

**Dedication by parol: Evidence.** A highway may be dedicated by parol without deed or other written evidence thereof, but the intent to dedicate must clearly appear and the acts and circumstances relied upon to show intent must be unequivocal and convincing. Evidence held insufficient to show dedication. *O'Malley v. Lumber Co.*, 186.

## HIGHWAYS Continued

TO

## HOMESTEADS

**Same: Establishment.** Where a petition asked the establishment of a highway commencing at a designated corner and running along the section line for some distance, the establishment of one beginning at a point on the line some distance from the designated corner will not be presumed to be based on the petition. *Lucas v. Payne*, 592.

**Same: Abandonment: Evidence.** A legally established highway may be abandoned, and in the instant case the evidence is held to show abandonment, conceding it had been established. *Idem*.

**Hedge fences: Trimming: Action to enforce same: Pleading and proof.** The statute requiring the trimming of hedge fences along public highways directs the road supervisor to see that it is enforced, except where the one district system for the township has been adopted and then the duty devolves upon the trustees; but where the trustees may maintain an action to compel the trimming of a hedge by the landowner, which is not conceded, they must allege and prove the adoption of the one district system. *Jones v. Thie*, 293.

**Same: Nuisance: Evidence.** Conceding that township trustees in their official capacity may maintain an action to require the trimming of highway hedges, on the ground that they are a public nuisance, the evidence on that question in the instant case is sufficient to support an adverse finding, and the judgment will not therefore be disturbed on appeal. *Idem*.

**Traction engines: Duty to assist travelers: Statute: Damages.** The statute relating to the operation of a traction engine along a highway is penal in character and will be strictly construed; so that one in charge of an engine which is not being operated along a public street or highway is not required to keep a man in advance to assist travelers with horses or other stock, although the way used by the engine may be used permissively by the public. *Burke v. Mally*, 555.

## HOMESTEADS.

**Election of widow: Agreement to will: Evidence.** The occupancy of property by a widow, including the homestead, under an agreement of the heirs of deceased to waive their legal right to distributive shares therein during her lifetime, will not establish an election on her part to take a homestead interest in the property, so as to entitle the heirs to enforce the agreement against her as a waiver of her right to a distributive share; nor will the arrangement be given effect as an agreement by the



## HOMESTEADS Continued

TO

## HUSBAND AND WIFE

widow to make a will devising her interest in the property in equal shares to her children. *Hemping v. Hemping*, 535.

**Purchase with pension money: Exemption: Resulting trust.** A homestead in the name of the wife is subject to a judgment against her on a debt antedating its acquisition if in fact her property, though purchased with pension money of the husband; but if the entire consideration was paid by the husband from his pension money, and the naked legal title taken in the wife, to whom there was no intention of transferring the real ownership, nor understanding or duty to do so, the husband remains the equitable owner under a resulting trust, and the property is exempt from a judgment for an antecedent debt against either the husband or wife. *Ratliff v. Elwell*, 312.

**HUSBAND AND WIFE.** See FRAUDULENT CONVEYANCES—  
REAL PROPERTY.

**Damages: Action by married woman: Instruction.** Where a married woman made no claim in her action for a personal injury that she was engaged in an independent occupation, an instruction permitting recovery for damages caused by her inability to follow any other vocation than that of keeping house for her husband was erroneous. *Burke v. Mally*, 555.

**Joint tenants: Lease by husband: Agency.** A husband who is a tenant in common with his wife can not bind her separate interest by a lease of the whole property without authority from her; but he may do so as her authorized agent, and his agency may be inferred from facts fairly indicating that his act in so doing was with her knowledge and consent. Evidence held to show agency of the husband to lease his wife's interest in their joint property. *Chamberlain v. Brown*, 540.

**Same: Ratification of agent's act: Estoppel.** A principal can not ratify and profit by a contract of lease made by an agent, and at the same time repudiate the obligations imposed by other provisions of the instrument. *Idem*.

**Same.** A contract will be construed against either party in the sense in which he had reason to believe the other party understood it; so that a lessor of property, under a lease made by an agent, will not be permitted to deny the right of the lessee to heat and light other property from the plant located on the leased premises, where it appeared that at a prior time, with knowledge of such use and without objection thereto he had made a written

HUSBAND AND WIFE Continued TO INSTRUCTIONS

agreement with the lessee recognizing and modifying the original contract. *Idem*.

**Support of husband: Liability of wife.** While the husband is chargeable at common law for the support of his wife, the wife is not liable for the husband's support, except so far as the statute makes the family expenses chargeable against both husband and wife, or either of them; and this statute does not impose upon the wife the expense of her husband's board while absent from their home in contemplation of separation. *Vose v. Myott*, 506.

**INJUNCTION.** See LANDLORD AND TENANT—MUNICIPAL CORPORATIONS—SURETYSHIP.

**INTEREST.** See TAXATION.

**INSTRUCTIONS.** In Criminal Cases, see CRIMINAL LAW. See ALSO AGENCY—APPEAL—SALES—SLANDER AND LIBEL.

**Statement of issues.** Where the issues are simple and the pleadings concise it is not prejudicial for the court to state the issues in the language of the pleader, although this practice has in some cases been criticised and condemned. But where it is adopted as preliminary to a statement of the issues withdrawn and of those to be submitted, it may result in clearness, especially where counsel in their opening statements have referred to all the issues as made by the pleadings, and there has been evidence received respecting all. *McDivitt v. Ry. Co.*, 689.

**Same.** Where the court in stating the issues set forth all the grounds of negligence alleged in the petition, a portion of which only were to be considered by the jury, it should have embraced in the same connection a concise statement of those questions which the jury was to determine; and a failure to do so until after instructions upon other matters was not a proper statement of the issues and was prejudicial. *Idem*.

**Ambiguity: Contradiction: When not cured by other instructions.** An ambiguous instruction, or one which standing alone is erroneous because of some omission, may be cured by another paragraph of the charge which is clear on the omitted or ambiguous point; but an affirmatively erroneous instruction, free from ambiguity, can not be cured by a correct statement of the point in another paragraph; as where the court charged that if the jury failed to find that decedent was not guilty of negligence contributing to her injury, the verdict must be for de-

## INSTRUCTIONS Continued

## TO

## INSURANCE

pendant, and in another paragraph told the jury that the decedent was guilty of contributory negligence, the instructions presented a direct contradiction which was not cured by the further statement that there might be a recovery notwithstanding decedent's contributory negligence. *Idem*.

**Separate counts.** Usually it is better to instruct upon separate counts in separate instructions, but where the evidence and instructions are direct and brief and the result is not confusing, a single instruction treating of both counts is not a matter of which complaint may be made. *Arnold v. Lutz*, 596.

**Limitation of jury to evidence and instructions.** A direction to the jury to arrive at its verdict solely from the evidence and instructions of the court is not objectionable as precluding consideration of the arguments of counsel. *Johnston v. Ry. Co.*, 114.

**Law of the case.** The instructions given upon a trial are the law of the case and the jury is bound to follow them whether right or wrong. *Kimball Bros. Co. v. Gas Co.*, 632.

## INSURANCE.

**Construction of policy.** In the construction of an insurance policy it will be given an interpretation most favorable to the insured. *Kirkpatrick v. Ins. Co.*, 74.

**Accident insurance: Cause of death: Presumption.** Where the cause of death is an issue the presumption is against suicide. *Klumb v. Traveling Men's Ass'n*, 519.

**Same: Circumstantial evidence: Sufficiency.** That the circumstances relied upon in proof of an accidental death may furnish any evidence of the conclusion sought to be drawn therefrom, the facts which the evidence tends to prove must be of such nature and so related to each other that the conclusion is the only one which can fairly and reasonably be drawn; it is not enough if they are consistent therewith, if equally consistent with some other conclusion. Evidence that the death of insured was due to a stray bullet is held insufficient to take the issue to the jury. *Idem*.

**Accident insurance: Notice and proof: Special finding: Inconsistency.** Notice and proof of injury that an insured was on a railroad track when struck by a train and injured are not inconsistent with a special finding that he was crossing a track on a public highway and entitled to recover the full amount

## INSURANCE Continued

of his indemnity, although the policy provided a smaller indemnity for injuries received while on the roadbed of a railroad except while crossing at a public highway. *McClure v. Accident Ass'n*, 350.

**Same: Proof of injury: Waiver.** Where the answer in a suit on an accident policy admits the waiver of any further proof of injury, no additional proof can be insisted upon however inadequate that made may be. *Idem*.

**Same: Injury while upon railroad track: Burden of proof.** Where an accident policy provides for less indemnity in case of injury while on the roadbed of a railroad, except when crossing at a public highway, the burden is on the insurer to show that the accident occurred at a place not in a public highway, and this burden is not shifted by a simple showing that the accident occurred upon a railroad track, thus requiring insured to show that it happened at a highway crossing; and the burden is on the insurer to show that the accident was the result of voluntary or unnecessary exposure to danger. *Idem*.

**Same: Limitation of right of action: Grounds of recovery: Amendment: Plea in bar.** Although an accident policy provides that no action shall be maintained unless brought within six months after termination of disability or after the injury assumes a permanent character, still the petition in an action brought more than six months after the injury, on the theory that it was of a permanent character, may be amended so as to claim recovery for a temporary injury; and proof that insured is gradually improving and likely to recover will support a finding that the injury had not assumed a permanent character, and thus a plea of the contract in bar of the action will be avoided. *Idem*.

**Same: Weekly benefits: Computation.** Where the by-laws of an accident association provided that weekly benefits should not mature until a stated time after the filing of satisfactory proofs, and it admitted waiver of such proofs, liability for the benefits should be computed from the date of waiver. *Idem*.

**Accident insurance: Self-inflicted injury: Presumption: Burden of proof.** In a suit upon an accident policy exempting the insurer from liability for self-inflicted injuries, it will not be presumed that the injuries were self-inflicted; or, under the facts of the instant case, that they were other than accidental; but the burden is upon the insurer to show its nonliability on this ground. *Kirkpatrick v. Ins. Co.*, 74.

## INSURANCE Continued

**Same: Construction of policy.** An insured attempted to pass over a platform and thus through a train while standing across a public street, and when alighting a sudden jerk of the car threw him to the ground and while in that position one of his arms was run over. *Held*, not to present a state of facts within the provisions of an accident policy absolving the company from liability for injury while entering, or trying to enter, or leaving a moving car, or while at a place in or upon a railway or other conveyance not provided for the use of passengers during transit; as the plaintiff was not a passenger, and the jury found he was not entering or leaving, or trying to enter or leave a moving train. *Idem*.

**Same: Cause of injury.** Even though insured was at a place where he was not permitted to be under the terms of his policy, to defeat recovery it was necessary for the insurer to show some causal relation between that fact and the injury. *Idem*.

**Same: Instructions.** Refusal to charge that if the injury resulted from plaintiff's act in leaving a moving conveyance the verdict should be for defendant was not erroneous, where it did not plead exemption from liability because plaintiff was on the platform of the car and in a place not provided for passengers during transit, and that such act contributed to the injury. *Idem*.

**Benefit insurance: Payment of assessments: Lapse of policy.** An assessment association authorized a bank to receive assessments from its members, acknowledge receipt and remit the same, but directed it not to receive assessments past due unless specially authorized. The decedent was a depositor at the bank and paid his assessments there and at one time told the cashier to pay his assessments, if at any time he neglected it, and to charge the same to his account. *Held*, that the alleged agreement with the cashier did not amount to payment of an assessment of which the cashier had no notice, but by reason of its nonpayment the policy had lapsed. *Griffith v. Life Ass'n*, 414.

**Benefit insurance: Stipulation: Estoppel.** Where by the terms of a stipulation in a suit on a benefit certificate involving the question of a claimed delinquent assessment, there was repeated reference to the assessment as having been made for the month of October, and it was conceded that if the method provided for giving notice of assessments was valid the defense based on nonpayment was complete, the plaintiff was estopped to deny that the assessment was due for the month specified. *Underwood v. Modern Woodmen*, 240.

INSURANCE Continued

TO

INTOXICATING LIQUORS

**Same: Notice of assessments: Sufficiency.** The agreement between a mutual assessment association and its members that notice of assessments shall be given by means of a printed publication, addressed and mailed in due time to each member, is not so unreasonable as to render it void; and conceding that a further provision making the affidavit of the publisher conclusive evidence of the mailing and receipt of the notice to be unreasonable, still such proof under the agreement would be a sufficient *prima facie* showing of notice, unless overcome by other evidence offered by plaintiff. *Idem*.

**Voidable contract.** A policy of insurance issued by an agent covering the property of a corporation in which he is a stockholder, and also otherwise interested as the cashier and stockholder in a bank owning stock in the corporation, is voidable, unless notice of that fact is communicated to the insurance company and the objection is waived. *Mercantile Co. v. Ins. Co.*, 607.

**Same: Dual capacity of issuing agent: Waiver.** Where a loss was adjusted by one having authority to transact all business incident to his employment, and having full knowledge that the agent who wrote the policy was financially interested in the corporation owning the insured property, but made no objection to payment of the loss on account of that fact, and the insured was put to trouble and expense in preparing and executing proofs of loss, the company was estopped from objecting to the issuing agent's dual capacity. *Idem*.

## INTOXICATING LIQUORS. See COURTS.

**Illegal sale: Contempt: Pleading.** An information charging the existence of an injunction against the sale of liquors in a certain building and city, and charging a violation thereof by a sale of certain specified intoxicants on such premises to certain named persons on a given day, is sufficiently specific as to time, place and buyers. *Pumphrey v. Anderson*, 140.

**Same: Burden of proof.** Prohibition is the rule in this State and the burden is upon the party charged with the illegal sale of liquor to show that he was lawfully operating under the provisions of the mulct law; so that an information charging a violation of an injunctive order absolutely restraining defendant from keeping or selling intoxicants on certain premises, which alleges generally that sales were made thereon in violation of law is sufficient, without negating the existence of facts which might excuse the defendant. *Idem*.

**INTOXICATING LIQUORS Continued                      to                      JUDGMENTS**

**Mulct saloons: Regulations: List of employees.** The statute requiring those operating a mulct saloon to file with the county auditor a list of all persons employed about the place of business includes not only regular barkeepers but all other persons in whatever capacity employed. *Pumphrey v. Anderson*, 201.

**Nuisance: Abatement: Closing of premises.** Upon the establishment of a liquor nuisance either in a civil or criminal case the order of abatement to be entered under the statute as a part of the judgment requires the effectual closing of the building for any purpose for the period of one year: there is no authority for decreeing that the building shall be closed so far as the sale of liquor is concerned, and at the same time used for other lawful purposes, unless released by giving bond as provided in the Code. *Lewis v. Brennan*, 585.

**Same: Certiorari: Failure to return record: Review.** Upon *certiorari* to review contempt proceedings in which defendant was not found guilty of violating an order restraining the illegal sale of liquor, where no transcript of the record upon which the findings were based was returned and no affirmative finding upon which the inference of guilt could rest, the discharge of accused must be regarded as conclusive of the matter. *Idem*.

**JUDGMENTS      See EQUITY.**

**Adjudication.** The determination by the Supreme Court in an action for interest on a note, that a judgment in a prior action was not an adjudication that the note was due, is binding in a subsequent action on the note after its maturity, whether right or wrong. *Hunter v. Porter*, 500.

**Default judgments: Motion to set aside.** While a motion to set aside a default is not the proper remedy when not filed within the statutory time, still where it contains all the essential allegations required in a petition for that purpose and is verified by attached affidavits, it will be treated as a sufficient petition under Code, sections 4091 and 4094. *Wallace v. Wallace*, 306.

**Same: Misconduct of counsel: Presumption.** Where a motion to set aside a default was confessed by plaintiff's attorney in the absence of defendant and his counsel, and time was given to answer, and upon expiration of such time a second default was taken which was again set aside on defendant's motion, the fact that the court was misled in making the order when the

## JUDGMENTS Continued

TO

## JUSTICE OF THE PEACE

first motion was confessed may be inferred from the fact that the second motion was sustained. *Idem*.

**Fraud in obtaining judgment: Jurisdiction.** Where a default judgment against a corporation was set aside and a federal court entered a decree of dissolution and appointed a receiver, and thereafter an intervener caused the action in the State court to be redocketed, alleged ownership of the original cause of action and obtained judgment without notice to the receiver and without disclosing the previous history of the case, the judgment so obtained is held to have been without jurisdiction and should be set aside at the suit of the receiver on the ground of fraud. *Hollister v. Vermont Building Co.*, 160.

**Presumption as to regularity.** In the absence of any record of the evidence or proceedings had upon the trial every presumption will be indulged in favor of the regularity of the judgment. *Distilling Co. v. Price & Co.*, 169.

**Vendors: Judgment for purchase price: Breach of agreement to perfect title.** Judgment on a promissory note given in settlement of the purchase price of land containing a condition precedent to payment should not be entered until the condition is performed, where the same is pleaded in defense; as where the instrument provided that payment should be subject to a proceeding to clear the grantor's title which rested upon a tax deed and the period of limitation barring the right to question its validity had not run, a breach of the condition was sufficient to defeat recovery on the note. *Pease v. Globe Realty Co.*, 482.

**JUDICIAL NOTICE.** See RAILROADS.

Courts will take judicial notice that porters of pullman cars usually assist passengers in entering and alighting therefrom; and passengers may assume that they are employees of the railway company in such sense that they may be relied upon for such assistance. *Cannon v. Railway Co.*, 37.

**JUSTICE OF THE PEACE.**

**Continuance without consent: Judgment: Invalidity.** A default judgment rendered upon a date to which a cause pending before a justice was continued without the consent of defendant or his counsel is void. *Simmons v. Dolan*, 177.

**Same: Appeal: Remand: Law of the case.** Where there has been an affirmative holding on pleadings unchallenged both in the district court and on appeal, that a justice's judgment was valid, the holding is conclusive on a second trial. *Idem*.

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JURORS

TO

LANDLORD AND TENANT

**JURORS.****Grand jurors: Member of election board: Disqualification.**

Membership of an election board does not disqualify one from serving as a grand juror, and the mere fact that the name of one of the judges of election was returned by the board of which he was a member affords no proof that the same was done at his solicitation. *State v. Clark*, 297.

**Same: Drawing of panel: Immaterial error.** A slight deviation from the statute as to the number of names required for a grand jury list from which the panel is drawn is not a material error. *Idem*.

**JURY TRIAL.** See PRACTICE.

**JURISDICTION.** See DRAINAGE—PRACTICE—SALES.

**Inferior tribunals. Presumption: Burden of proof.** Jurisdictional facts need not be shown of record but will be assumed in support of the findings of tribunals of inferior and limited jurisdiction the same as in the case of courts of general jurisdiction; and the burden is upon the party attacking the jurisdiction of such a tribunal to overcome this presumption. In re Appeal of Head, 651.

**LACHES.** See EQUITY—SURETYSHIP.

**LANDLORD AND TENANT.**

**Disturbance of possession: Damages.** A tenant can not offset against his rent a claim of damages by reason of the fact that the tenants of other apartments in the same building so conduct the same as to constitute a nuisance, where the landlord upon complaint did what he could to terminate the nuisance and caused the objectionable parties to vacate, and after making complaint the tenant paid rent without further objection. *McCullough v. Houar*, 342.

**Leases: Execution: Parol evidence.** A lease signed by only a portion of the interested parties, under an agreement that it should not be binding until signed by all, is not executed until so signed; and oral evidence of the agreement is not objectionable as tending to vary the writing, but is competent to show that it never became obligatory. *Fuel Co. v. Littlejohn*, 221.

**Leases: Unilateral contract.** Where the terms of a lease contemplate that all the interested parties shall sign the same, and

**LANDLORD AND TENANT Continued**

the lessee is obligated to work and pay rent for the premises, it is not an unilateral instrument. *Idem.*

**Recovery of possession: Equitable action: Waiver.** Where a landlord was present at a sale by the tenant of growing corn and pasturage and knew of an assignment of the lease to the purchaser and of his possession thereunder, thus impliedly if not expressly assenting thereto, and it did not appear that the assignee was committing any waste, the landlord can not adjudicate the purchasers right of possession in a court of equity. *Doige v. Bruce*, 210.

**Use of premises.** In the absence of restrictions in the lease the tenant may use the premises as he chooses, not materially different however from the purpose for which they were specifically designed, as long as he does not commit waste or create a nuisance. *Chamberlain v. Brown*, 540.

**Same: Restriction of use of premises: Injunction.** Where a lease expressly limits the use of premises to a specific purpose and prohibits its use otherwise, equity will enjoin a violation of the restriction by the tenant. *Idem.*

**Same: Implied restrictions.** There may be an implied limitation of the use of leased premises by a tenant, but it will only be found or enforced, when a fair construction of the instrument demands it; and the mere statement that the premises may be used for a certain purpose will not give rise to an implied agreement that it would not be used for any other purpose, especially where there is a further provision that the tenant will not permit waste, or use the premises for any unlawful, improper or offensive purpose. *Idem.*

**Same: Construction of lease.** The circumstances under which a lease was made, the conduct of the parties respecting the same, the condition of the premises and the practical interpretation of the instrument by the parties themselves, are matters to be considered as bearing upon the implications to be drawn therefrom. *Idem.*

**Same: Parol evidence.** While parol evidence can not be received to vary the terms of a written lease, still it may be admissible to show the manner in which it was understood by the parties. *Idem.*

**Same.** As bearing upon the intention of parties to a lease, the use made of the premises at and prior to the lease, their condition and suitability for a given purpose may be shown by parol:

LANDLORD AND TENANT Continued TO MARRIAGE AND DIVORCE

and, where the lease is silent as to the use of the premises the intention may be supplied by parol. *Idem.*

**Waste.** A tenant does not violate his covenant not to commit waste by using the heat and light on the leased property to heat and light adjacent property, where such use does not overtax or deteriorate the plants. *Idem.*

**LEASES.** See LANDLORD AND TENANT—MINES AND MINING.

**LIENS.** See MORTGAGES.

**LIMITATION OF ACTIONS.** See CORPORATIONS.

**MANDAMUS.** See TAXATION.

## MARRIAGE AND DIVORCE.

**Breach of marriage promise: Evidence: Issues.** Where the evidence in a breach of promise suit was conflicting as to whether plaintiff was afflicted with a venereal disease prior to the time fixed for marriage, and whether the same was curable, an issue as to plaintiff's good health at the time of the alleged breach was presented. *Beans v. Denny*, 52.

**Same: Corroboration.** In breach of promise cases corroboration of plaintiff's evidence of sexual intercourse with defendant is not required. *Idem.*

**Same: Evidence: Reputed wealth.** A witness who has known a defendant in a breach of promise suit for a long term of years, and resided in the same county practically all of the time, is qualified to testify to his reputed wealth in that county, where it is shown that defendant was well known. *Idem.*

**Same: Evidence.** In a breach of promise action the conduct of the parties toward each other during the engagement period may be shown in determining the existence of the contract, and this includes sexual intimacy. *Idem.*

**Cross-examination.** The cross-examination of plaintiff in a breach of promise suit with respect to a subject not developed in the direct examination, and relating to a matter of defense which must be pleaded to be available, should not be allowed. *Idem.*

**Same: Instruction.** Where there was no evidence that plaintiff was suffering from a venereal disease at the time of the engagement, as claimed by defendant, or that he had knowledge thereof

**MARRIAGE AND DIVORCE Continued**

at that time, an instruction requiring a finding of want of such knowledge at the time of the engagement as a condition precedent to a verdict for him, while superfluous, was not prejudicial. *Idem.*

**Same: Justification.** A person is excusable for declining to carry out his promise of marriage with one afflicted with an incurable venereal disease, unless made with knowledge of the disease. *Idem.*

**Same: Pleadings: Issues: Instructions.** A defendant can not complain of the court's instructions regarding his plea in bar of a suit for breach of marriage promise, where the interpretation placed upon the pleading by defendant as disclosed in his requested instructions is adopted by the court. *Idem.*

**Same: Illicit intercourse: Evidence.** Where the parties to a breach of promise suit were the only witnesses on the question of their sexual intimacy, affirmed by plaintiff and denied by defendant, an instruction that mere opportunity would not warrant a finding that it occurred, nor be sufficient as corroborative evidence if the parties were equally creditable, but might be considered with other evidence on that subject, was correct. *Idem.*

**Same: Damages: Instruction.** Where the court in one paragraph of the charge expressly told the jury not to allow damages for illicit intercourse, a further instruction that in measuring the damages for breach of the marriage promise, the intimacy of the parties and defendant's conduct toward plaintiff might be considered, did not authorize a finding of damage on that ground. *Idem.*

**Submission of issues.** Where the court told the jury to consider the intimacy of the parties and all injuries sustained by plaintiff including loss of affection, etc., failure to especially refer to defendant's plea in mitigation of damages that she had become illtempered and expressed a dislike for defendant and his children was not reversible error, especially as no request was made therefor. *Idem.*

**Divorce: Inhuman treatment: Evidence.** The evidence in a divorce action is reviewed and held to justify a decree in favor of the wife on the ground of inhuman treatment, and that the wife was not guilty of conduct which would excuse the husbands treatment of her. *Caldwell v. Caldwell*, 192.

**Same: Custody of minors.** The mother is the natural custodian

MARRIAGE AND DIVORCE Continued TO MORTGAGES

of children of tender years and upon divorce they will ordinarily be given to her, especially where she is not the offending party and it appears that she is able to furnish them a comfortable home, support and education. *Idem*.

**MASTER AND SERVANT.** See NEGLIGENCE.

**MEANDER LINES.** See REAL PROPERTY.

## **MINES AND MINING.**

**Leases: Acceptance.** A lease of coal land executed by only a portion of the grantors, with the understanding that it was not to be binding until signed by the other grantors and the lessee, was not rendered obligatory by the fact that the lessee, without signing the instrument, went onto the premises and prospected for coal under a provision that he might do so, and if in his opinion coal in paying quantities was found he should mine the same and pay a royalty to the lessors, since by the terms of the contract it was optional with him whether he should mine or not. *Fuel Co. v. Littlejohn*, 221.

**MISCONDUCT.** See NEW TRIAL.

## **MORTGAGES.**

**Deed as security.** A deed absolute in form may be declared a mortgage where it is satisfactorily shown that the same was intended as security for a debt, even though given subject to a mortgage which the grantee assumed and agreed to pay. *Veeder v. Veeder*, 492.

**Same: Rights of grantee.** The grantee in a deed declared to be a mortgage should be credited with all sums expended by him in payment of the grantor's debts, or in improving the property. *Idem*.

**Equitable mortgage: Assessment of mortgagor's interest: Execution sale.** Where the grantee's name in a deed was erased and another inserted and the deed was then delivered to him as security for part of the purchase price advanced, with a separate contract back acknowledging receipt of the deed and agreeing to hold the title in trust and to reconvey to the real grantee upon payment of the sum advanced, such substituted grantee held the apparent legal title and both the real grantee and those claiming under her were bound by the agreement as thus completed, although the method adopted for creating the trust may have been irregular; and an assignment of the

**MORTGAGES Continued**

contract by the real grantee extinguished her remaining interest and vested the assignee with title subject to the equitable mortgage, so that a subsequent judgment against the assignor was not a lien upon the property and the purchaser at execution sale acquired no interest therein. *Witmer v. Shreves*, 496.

**Foreclosure: Parties.** The foreclosure of a mortgage does not cut off the rights of persons in the property who are not made parties to the proceedings. *Teachout v. Duffus*, 466.

**Foreclosure: Subsequent action on note: Adjudication.** Defendant gave plaintiff a note containing no provision by which the payee might declare it due before maturity, and gave the surety on the note a mortgage to secure him against liability which did provide that in case of default in payment of the note, interest or taxes the whole amount might be declared due. The surety assigned the mortgage to the payee of the note who foreclosed for the full amount for which the surety was liable. *Held*, that as the mortgage did not authorize the payee to declare the note due prior to its maturity the foreclosure of the mortgage was not an adjudication of the right to sue on the note after its maturity. *Hunter v. Porter*, 500.

**Priority of liens: Subsequent purchaser: Notice.** A simple decree in favor of a creditor establishing his right to subject property of the debtor to his judgment, will not entitle him to the protection of the recording act as a subsequent purchaser, as against prior equities and unrecorded instruments; it is only when he buys in the property at execution sale that he becomes a subsequent purchaser. *Bank v. Smith*, 255.

**Same: Description: Sufficiency: Notice.** A description of land, although not entirely clear and satisfactory in itself, which is sufficient, by the application of existing facts and conditions ascertainable on reasonable inquiry, to point out the specific tract intended to be described will operate to charge a purchaser with notice. *Idem*.

**Same.** Where the first and second mortgages contained similar and indefinite descriptions of the land, but the second expressly referred to the first and was made subject thereto, the filing of a third mortgage for the purpose of correcting the description in the first made a record sufficient to charge a subsequent purchaser of the land described in the third mortgage with notice of the second mortgage. *Idem*.

## MUNICIPAL CORPORATION.

**MUNICIPAL CORPORATIONS. See POOR PERSONS.**

**Contracts for public improvement: Conformity with prior proceedings.** A contract entered into with the successful bidder for the construction of a public improvement must conform substantially with the terms and conditions constituting a basis for the competitive bidding; but this rule is not as generally applied where the improvement has been completed as where the right to enter into the contract is challenged at the inception of the proceedings and before the contractor has done his work, or where there was a previous understanding with the successful bidder which was withheld from others. *Hedge v. Des Moines*, 4.

**Same.** In the instant case the notice to bidders provided that the cost of the improvement should be charged to abutting property according to law, and payment in full for the work to be made in assessment certificates. The contract entered into provided that if the cost of the improvement might not lawfully be assessed against the abutting property the city would pay the same out of a special fund. *Held*, in view of the fact that no objection to the contract was made in advance of its complete performance in accordance with specifications; that the variance in the contract was of no benefit to the contractor, but rather to the city; and as it was in compliance with an ordinance protecting the city from a general liability for deficiency, and with the statute as understood by the parties, there was not such a substantial departure from the notice as to invalidate the contract. *Idem*.

**Same: Contracts: Guaranty provisions.** The provision in a paving contract that the contractor shall keep the improvement in repair for a series of years is not a matter of which abutting owners can complain because casting upon them a burden not authorized by the statute, as the same is essentially a guaranty of good work; and this is especially true where the objectors to the assessment in petitioning for the improvement asked that the provision be incorporated in the contract. *Idem*.

**Petition for public improvement: Signatures by agents: Authority: Evidence.** Where the petition for a public improvement purports to have been signed in part by the duly authorized agents of abutting owners, the city council will be presumed to have satisfied itself as to the authority of such agents before adopting the resolution of necessity; and the finding of the council makes a *prima facie* case in that respect. In the instant case the evidence of want of such authority is held insufficient

## MUNICIPAL CORPORATIONS Continued

to overcome the *prima facie* case made by the record of the council. *Idem.*

**Special assessments: Objections: Evidence of filing.** On appeal from the assessment of the cost of certain paving the evidence is held to show that an amendment to the original objections filed before the city council was in fact filed, although not found among the files at the time of the trial in the district court, and therefore is treated as a part of the objections duly filed. *Idem.*

**Same: Objections: Waiver.** Objections to a special assessment for the cost of paving not filed within the time provided by Code, sections 823-4, and not until after the hearing before the council can not be considered, even though notice was given at the hearing that such objections would be filed. *Idem.*

**Same: Benefits: Front foot rule.** Where a special assessment purports to have been made according to benefits and such is the finding of the council, this finding is not impeached by the fact that the result is the same as though the assessment had been made by the front foot rule. *Idem.*

**Same: Benefits: Evidence.** In the matter of an assessment for a public improvement the evidence is held to show that abutting owners received the benefits for which they are assessed. *Idem.*

**Same: Counterclaim for value of old improvement.** Conceding that an abutting owner has a claim against a city for the value of an old pavement constructed by special assessment, which has been removed by the city, still its value can not be setoff against an assessment payable to the contractor for constructing a new one, as the city acts in a legislative capacity in making the assessment. *Idem.*

**Same: Diversion of funds.** A special assessment is a tax levied for a special purpose and is not subject to counterclaim, setoff, attachment or execution. *Idem.*

**Same: Waiver of irregularity.** Where special assessment proceedings up to the time of filing objections and the hearing thereon did not disclose a purpose to assess the abutting property in excess of the depth of one hundred and fifty feet, the irregularity in so doing was not waived by failing to make objection thereto before the council. *Idem.*

**Special assessments: Objections.** Where an abutting property owner appears before the city council pursuant to notice, and



## MUNICIPAL CORPORATIONS Continued

files objections to the proposed special assessment of his property for public improvement because of errors, irregularities or inequalities therein, he is thereafter limited to the objections thus made, except where fraud is shown or the question of jurisdiction is involved; and the defects complained of must be definitely pointed out. *Andre v. City of Burlington*, 65.

**Same: Notice: Waiver of defects.** Defects or irregularities in the notice of intention to construct a sewer are waived by appearance in response thereto. *Idem*.

**Special assessments: Benefits.** It will be presumed on appeal that a special assessment was made on the basis of benefits, and the method employed by the council in so doing is not material: it may be arrived at according to the area of the abutting property. *Idem*.

**Same.** Although a special assessment for benefits is arbitrary and without reference to the benefits to certain property, it is not ground for setting the entire assessment aside as invalid for that reason, but the error should be corrected. *Idem*.

**Same.** Where no fraud is shown the finding of the council with reference to benefits, which omits certain property from an assessment for good cause, should not be disturbed. *Idem*.

**Special assessments: Estoppel.** Property owners who have appeared before the city council and urged their objections to a proposed special assessment for a public improvement, and having failed to appeal from the action of the council with respect thereto, are thereafter estopped to question the assessment or maintain an action to enjoin its enforcement, unless the council was wholly without jurisdiction to order the same. *Nixon v. City of Burlington*, 316.

**Same: Waiver of objection.** The city council may by appropriate legislation provide for a wider pavement than that contemplated by the original contract, even after work under the first contract had commenced, if convinced that public convenience requires it; and if there was any irregularity in the proceedings by which the burden of the tax payer was unduly increased the remedy is an appeal from the assessment, otherwise the objection is waived. *Idem*.

**Same.** Objections that the notice to contractors was not definite and specific; that the record of the city clerk does not show whether an improvement was made upon petition or on motion of the council; that a fair and impartial hearing of objec-

## MUNICIPAL CORPORATIONS Continued

tions to the assessment was not accorded tax payers, do not go to the jurisdiction of the council and the remedy is by appeal. *Idem.*

**Public improvement: Resolution of necessity: Vote of council.**

The statute requiring a three-fourths vote of the council in ordering a street improvement when not petitioned for has no reference to the action fixing the time when the resolution of necessity will be heard, a majority vote of the council being sufficient for that purpose; but the three-fourths majority vote applies to the final vote ordering the improvement. *Idem.*

**Same: Letting of contract: Record of vote.** The record of a city council's vote in letting a contract for a public improvement is sufficient if made upon sheets of roll calls specially prepared for that purpose. *Idem.*

**Notice of resolution of necessity: Publication on Sunday.** The fact that the last publication of a notice of resolution falls on Sunday will not render the notice insufficient; as purely ministerial acts may be lawfully performed on Sunday. *Idem.*

**Resolution of necessity: Details of proposed improvement.** It is not necessary that the preliminary resolution of necessity for paving a street state the details of all materials to be used and the method and manner of their use; so that omission from such resolution of any mention of the foundation for the pavement did not render it fatally defective. *Idem.*

**Correction of assessment: Confirmation.** Where property was illegally assessed in excess of one hundred and fifty feet, the Supreme Court on appeal, under the peculiar circumstances of the case, confirms the assessment to that extent with legal interest from the date of the original delinquency, and cancels the same as to all property in excess of one hundred and fifty feet, rather than order an entire new assessment. *Hedge v. Des Moines*, 4.

**Construction of sewers: Street intersections, etc.: Assessment of cost.** The cost of constructing a sewer at street intersections, manholes and catch basins, may be charged to abutting property, even though put in for drainage purposes and to take the water from the streets, especially where the abutting property is also drained. *Andre v. City of Burlington*, 65.

**Same: Resolution of necessity: Objections: Waiver.** Failure of the resolution of necessity to describe adjacent property to be as-

## MUNICIPAL CORPORATIONS Continued

essed is a mere error, irregularity or defect, which is waived by omission to make objection thereto before the council. *Idem*.

**Care of sidewalks: Notice: Evidence.** On an issue as to whether defendant city was chargeable with notice of the alleged defective conditions of its sidewalks, in time to have repaired the same prior to plaintiff's accident, it is held under the evidence to have been a question for the jury. *Krisinger v. City of Creston*, 154.

**Same: Personal injury: Damages: Recovery by wife.** A wife may recover as damages the expense of medicine and medical attendance incurred by reason of a personal injury resulting from the negligence of another, where she actually employed the physician and obligated herself to pay it on her own account; although ordinarily the husband is liable for such expenses and presumably such damages accrue to him. *Idem*.

**Sidewalk accident: Notice: Description of place.** The notice to be served upon a city specifying the time, place and circumstances of a sidewalk accident, to preserve a right of action therefor for more than sixty days, must be wholly in writing and must describe the place with sufficient definiteness to enable a person of ordinary capacity and with knowledge of the physical conditions of the street, when in the exercise of reasonable diligence, to locate the place of injury from the description contained in the notice. *Sollenbarger v. Lineville*, 203.

**Same.** The description in the notice can not be aided by oral proof that the municipal authorities were verbally advised of the precise place of accident. *Idem*.

**Same.** Where an accident occurs because of a loose board, proof that there was but a single board loose in the walk on the street designated in the notice might within reasonable limits be good, but where the only reference to the place of accident was a certain street three-fourths of a mile long the notice was insufficient, for the authorities are not required to search the entire street. *Idem*.

**Same: Sufficiency of notice: How determined.** Where the place of accident described in a notice given the municipality is wholly indefinite and uncertain, and there is no extrinsic evidence in aid of the notice, its sufficiency is a question of law. *Idem*.

**Street improvement: Injunction by tax payer.** A resident tax payer of a city, whose property is unaffected by the improvement

## MUNICIPAL CORPORATIONS Continued TO

## NEGLECT

of a street and the building of a retaining wall, can not enjoin the city from making the improvement on the ground that it is being done in part for the benefit of a street car company by construction of the wall outside the street line, where the same appears to be reasonable and proper for public use, and the street car company is contributing to the expense so that the cost to the city will be less than otherwise. *Patterson v. City of Burlington*, 291.

**Same: Acquisition of additional land for streets: Irrevocable license.** Where written permission has been given the city by the owner of ground adjoining a street to erect a retaining wall thereon for the improvement of the street, and the city has acted thereon, it has acquired the same right to construct and perpetually maintain the wall as though it had purchased or condemned the ground. *Idem*.

**Vacation of streets: Ordinances: Construction of street railway: Damages.** An ordinance vacating a portion of a street, granting its use for right of way purposes and conveying the fee to the State, is not objectionable as embracing more than one subject, since its purpose is to convey the fee subject to the easement: and as the street when vacated becomes in effect private property of the State subject to the right of way, the railway company may construct and operate its line over the same without procuring the usual franchise in such cases, and without compensation in damages to abutting property owners. *Tomlin v. Ry. Co.*, 599.

**NEGLECT** See RAILROADS.

**Master and servant: Safe place to work: Assumption of risk: Evidence.** In an action to recover for personal injuries to plaintiff while employed in a building, the question of the employer's negligence in failing to provide plaintiff a safe place to work by repairing the floor of the building, and the plaintiff's assumption of the risk by continuing in the employment after a promise to repair, are held under the evidence to have been for the jury. *Miller v. Monument Co.*, 701.

**Same: Promise to repair defects.** An employee who continues to work in a building with knowledge that the floor of the room is unsafe assumes the risk incident thereto, unless he objects to the unsafety of the place and remains under a promise of repair, in which event he does not assume the risk during a reasonable time for the master to make the repairs; unless, of course, the

## NEGLECTANCE Continued

hazard is so great that a person of ordinary care knowing the same, would not continue the service. What is a reasonable time to remain in the service after a promise of repair, and whether an employee is justified in remaining even upon such promise, are ordinarily questions for the jury. *Idem.*

**Same: Duty of servant to repair.** A servant who is not employed to do carpenter work is under no obligation to repair an unsafe place in the building in which he is engaged; and even if he was he is relieved of the duty by an order of his superior directing him not to make the repairs, so that his failure to do so is not negligence. *Idem.*

**Contributory negligence: Evidence.** It is the duty of an employee to exercise reasonable care for his own safety, and if he knows, or by the exercise of reasonable care should have known of a defect in the floor of a building in which he was employed, and of its dangers, his temporary forgetfulness of the dangerous situation is not an excuse for failure to exercise such care. Evidence held to show plaintiff guilty of contributory negligence in stepping into a hole in the floor of the building in which he was at work. *Idem.*

**Assumption of risk: Contributory negligence: Evidence: Distinction.** Assumption of risk is a waiver of defects or dangers and consent on the part of an employee to assume them regardless of the exercise of care on his part, and is a matter of contract, while contributory negligence grows out of the conduct of an employee and is not based upon any contract relation. *Idem.*

**Negligence of master: Evidence.** In an action for the death of an employee resulting from injuries received from the breaking of the hoist chain of a grader, the evidence is held sufficient to support a finding that defendant was negligent in using the defective chain. In re Estate of Jones, 615.

**Same: Negligence: Safe place to work: Contributory negligence.** An employee assisting in the operation of a grader, when required to go beneath the machinery to aid in starting the belt by which it was operated, had the right to assume that it was so constructed that it was a reasonably safe place in which to work, in the absence of any knowledge or warning that the machinery was defective. In the instant case the circumstances are such that the issue of plaintiff's negligence should have been submitted to the jury. *Idem.*

## NEGLECTANCE Continued

**Same: Scope of employment: Evidence.** Evidence that teamsters engaged in hauling dirt from a grader were requested by the person in charge of the machine to assist in starting the elevator by going underneath the same is held sufficient to warrant a finding that such was the custom, and that plaintiff in so doing was not a volunteer but in performance of a duty incident to his employment. *Idem.*

**Same: Custom: Evidence.** While a custom can not be established by proof of a single act or transaction, still it may be shown by the testimony of a single witness. In the instant case, however, the evidence was not of a custom, but of the fact that in operating a grader it was customary for the employees to assist in starting the elevator when clogged by going underneath the same, and was competent for the purpose of showing that plaintiff in so doing was acting within the line of his duty. *Idem.*

**Master and servant: Failure to guard machinery: Negligence.**

The statute requires that saws in manufacturing establishments, when it can be done, shall be so guarded as to prevent injury to workmen; and a failure to do so is negligence, irrespective of the question of custom. In the instant case the evidence was such as to show that defendant might have provided suitable protection by means of a board or hood. *O'Connell v. Smith & Son, 1.*

**Same: Assumption of risk: Contributory negligence.** An employee operating a circular saw does not assume the risk of dangers not appreciated. In the instant case assumption of the risk of danger from flying particles of wood in the use of a circular saw, and of plaintiff's negligence, were for the jury. *Idem.*

**Instructions.** Where the court specifically told the jury what constituted negligence on the part of defendants, another general instruction to be read in connection therewith, that it was necessary for plaintiff to show that defendant was guilty of negligence causing the injury, did not authorize a finding of negligence regardless of the issues pleaded. *Johnston v. Ry. Co., 114.*

**Same.** Where the negligence charged was in failing to keep the steps of a street car free from snow and ice, and the failure of the conductor to assist plaintiff in alighting, an instruction that evidence of the dangerous condition of the steps would show a duty on the part of the conductor to render such assistance was proper. *Idem.*

## NEGOTIABLE INSTRUMENTS

## NEGOTIABLE INSTRUMENTS.

**Bills and notes: Consideration: Direction of verdict.** A promissory note imports a consideration, and where there was no evidence of want of consideration and plaintiff had shown that defendant executed and delivered the note as his individual obligation, the question of his liability was for the jury. *Zimbelman v. Finnegan*, 358.

**Same: Pleading.** The plaintiff in suing upon a note is not required to plead a consideration for the instrument; nor is he required to state it in reply to defendant's plea of want of consideration. *Idem*.

**Same: Execution: Agreement of parties.** An agreement between the parties that it was not to become binding on the maker until signed by others must be mutual, for if the agreement was that of one only it would not bind the other. *Idem*.

**Same: Consideration.** Extension of time of payment to the principal debtor; acceptance of a note as security for a debt or forbearance to sue upon present claims; or a note given for the debt of another with an agreement express or implied to extend the time of payment is sufficient consideration for the note; so that where a park association purchased lumber of plaintiff and being unable to pay, the defendant, a stockholder and secretary of the association, gave his note therefor payable in one year, either as his individual obligation or to be signed by other stockholders also, and thereafter the association was not regarded as a debtor, or, if a debtor, the time of payment was extended, the note was supported by a consideration. *Idem*.

**Same: Statute of frauds.** Where a promissory note was executed in consideration of the extension of the time of payment of the debt of another, and the only question in dispute was the sufficiency of the consideration, the statute of frauds was not involved. *Idem*.

**Same: Extension of payment: Implied agreement.** The circumstances in the instant case are held sufficient to support an implied agreement by the creditor to extend the time of payment of the debt of another upon the execution and delivery of the note in suit. *Idem*.

**Bills and notes: Extension of time: Consideration.** A definite agreement for the extension of a note to a fixed time is a sufficient consideration for the extension, although the maker

## NEGOTIABLE INSTRUMENTS Continued TO PARTITION

parts with nothing but simply agrees to keep the money for the extended time at the same rate. *Conkling v. Young*, 676.

**Same: Bona fide purchaser.** Where it appears from the note itself that time of payment has been extended, it can not be said to have been dishonored because not paid at the original date of maturity; and a purchaser thereof for value, before final maturity and without notice, is entitled to the proceeds as against an attaching creditor of the payee. *Idem*.

**NEW TRIAL.** See JUDGMENTS.

**Fraud.** A litigant will not be allowed to profit from the breach of an agreement between attorneys respecting a disposition of a cause; and where a motion to open a default was confessed in the absence of opposing counsel, although there was an understanding that the matter should not be taken up until both counsel were present and time was given to answer, of which defendant's counsel had no notice or knowledge, but upon expiration of the time a second default was taken, defendant is held entitled to a new trial on the ground of fraud under the provisions of Code, section 4091. *Wallace v. Wallace*, 306.

**Misconduct in argument.** In the absence of objection thereto error can not be assigned on the use of improper language in argument to the jury. *Beans v. Denny*, 52.

**Time for perfecting.** Errors presented in a motion for a new trial will be reviewed where an appeal from the ruling thereon is taken within six months, although the time for appealing from the judgment in the action had expired. *Lumber Co. v. McCaffrey*, 730.

**NOTICE.** See DRAINAGE—SURETYSHIP—TAXATION.

**NUISANCE.** See HIGHWAYS—INTOXICATING LIQUORS.

**OPTIONS.** See REAL PROPERTY.

**PARTIES.** See APPEAL—PLEADINGS.

**PARTITION.**

**Terms of sale: Review of order.** An order in partition appointing referees and directing a sale for cash if it can be made, if not, then partly for cash with balance on time secured by a mortgage back on the land, will not be disturbed on ap-

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peal; especially where the matter is still in the control of the district court who may make such further order as the interests of the parties may require. *Brown v. North*, 215.

## PARTNERSHIP.

### **Settlement between partners: Abandonment: Burden of proof:**

**Evidence.** The member of a firm seeking to set aside a written agreement of settlement of the partnership business, on the ground that it had been abandoned by them, has the burden of proving the abandonment, which can not be done by a showing of mere inference or indefinite understanding to that effect. *Fritz v. Berry*, 721.

**Same: Substitution of new agreement.** The parties to a controversy over mutual obligations may substitute therefor the mutual obligations of a new agreement, and when this is done their rights and liabilities will be determined thereby. In the instant case the substituted agreement is held to have become effective as a new agreement, rather than that their previous obligations should be extinguished when the settlement was fully carried out. *Idem*.

**Same: Rescission.** One partner can not rescind a contract or settlement between them regardless of the assent of the other by taking possession and disposing of the partnership property as his own without tendering back any advantage he had already received under the contract. *Idem*.

**Sale to partner: Action for the price.** Where the answer to a suit for the price of liquor admits the purchase and offers no defense, except that the sale to them was illegal, it is immaterial whether the person who acted for the firm in making the purchase was a member of the firm. *Distilling Co. v. Price & Co.*, 169.

**Payment of firm debts by continuing partner.** The agreement of a partner continuing the business that he will pay the firm debts in consideration of a transfer to him of the interests of the retiring partners in the firm property may be enforced. *Lumber Co. v. McCaffrey*, 730.

**Same: Delay in bringing suit: Acceptance of agreement.** Delay in suing on the agreement of a continuing partner to pay the firm debts will not defeat the action, unless barred by statute; and commencement of action is a sufficient acceptance of such agreement. *Idem*.

## PARTNERSHIP Continued

TO

## PLEADINGS

**Same: Rescission.** A continuing partner who agreed to pay the firm debts in consideration of a transfer to him of the other interests in the property, can not avoid liability therefor on the ground of rescission, where he had made no offer to return the consideration received; and such failure can not be excused by a showing that the retiring partners did not desire a return of the property. *Idem.*

**Forfeiture: Presumption.** Where a continuing partner agreed to pay the firm debts in consideration of a transfer to him by the retiring partners of their interest in the property, he can not urge on appeal from a judgment in favor of a creditor that a lease of mining property held by the firm had been forfeited at the time of the transfer to him, and that there was no consideration for his assumption of the debts, where the record did not show a forfeiture; as a forfeiture will not be presumed. *Idem.*

**Assumption of indebtedness: Fraud: Evidence.** In an action by a firm creditor to recover of one partner continuing the business on the strength of his agreement to pay the firm debts, the evidence is held insufficient to show that a retiring partner had knowledge of false representations made to defendant regarding the condition of the property. *Idem.*

**PAUPERS.** See POOR PERSONS.

**PLEADINGS.** See NEGOTIABLE INSTRUMENTS—POOR PERSONS.

**Amendment after trial.** Where no issue as to the validity of an insurance assessment was raised until after submission of the cause, that question could not be brought into the case by amendment without first setting the submission aside and giving the association an opportunity to be heard. *Griffith v. Life Assn.*, 414.

**Breach of contract: Pleading.** A petition alleging the falsity of covenants of warranty in a deed and also a written tender of rescission, and asking damages to the amount of the consideration paid, presents an action for recovery of the consideration and not one for damages for breach of warranty. *Oliver v. Kneeder*, 158.

**Misjoinder of parties: Amendment.** The inadvertent allegation in one count of a petition that plaintiff was a corporation when it was in fact a partnership as alleged in another count, may be corrected by amendment and when so corrected the pleading does not present a diversity of parties. *Acme Food Co. v. Howerton*, 265.

PLEADINGS Continued TO POOR PERSONS

**Time for filing.** A counterclaim filed with an answer, if the answer is accepted as filed in time, should not be stricken as not timely. *Smith v. Redmond*, 105.

## POOR PERSONS.

**Support of poor: Recovery of expenditure: Pleading.** A petition alleging that a county charge was furnished food, clothing, medicine and medical attendance at the expense of the county for a specified time and price per week, to which was attached an account of board, washing, care, medical attendance and medicine. for the same time and price, should be treated as presenting a cause of action for the amount expended rather than for the reasonable value of the support furnished, as the account merely made the petition more specific. *Hamilton County v. Hollis*, 477.

**Same.** The county is not limited in its recovery for support of the poor to money actually paid out, but may recover of the indigent person, his estate, or of those by statute liable for his support, such sums as it has expended for relief and support at the poorhouse or elsewhere. *Idem*.

**Same: Evidence of amount due.** The mere fact of difficulty in determining the amount expended in support of each individual at a county poor farm will not affect the liability of those primarily responsible therefor; and in the absence of evidence to the contrary the expense will be presumed to have been the reasonable value of maintaining each, and evidence of such reasonable value is admissible as tending to prove the amount due. *Idem*.

**Same: Application for support.** It is not necessary that application for the support of an indigent person at county expense be made by the recipient of the bounty, it may be made by another. *Idem*.

**Same: Who are poor persons.** A poor person, within the contemplation of the statute relating to their support at public expense, is one who has no property which can aid in his support or out of which funds can be realized for his maintenance; so that an aged couple having only the life use of a small, out of repair dwelling, with no means and physically unable to support themselves are poor persons within the meaning of the statute. *Idem*.

**Same: Recovery by county.** A county is not precluded from re-

## POOR PERSONS Continued

## TO

## PRACTICE

covering of the relatives of a poor person the expense of his support at the poor farm because their liability has not been first adjudicated as provided by Code section 2219. *Idem.*

**Same: Support of soldiers of the Civil War: Liability of relatives.** Where the necessities of a soldier of the Civil War and his widow require an expenditure greater than that provided by Code section 2230, they may be maintained at the county poor farm when they voluntarily go there and remain, and their relatives chargeable with their support are liable to the county therefor. *Idem.*

**PRACTICE.**

**Absence of judge.** Where there is no showing that a presiding judge was absent from the court room during the trial his presence will be presumed. *Beans v. Denny*, 52.

**Assignment of causes for succeeding term.** Conceding the courts inherent power to assign a cause for trial on a particular day of a future term, it can not do so where the issues have not been made up and it does not appear that there will be anything to try at the time set. *Smith v. Redmond*, 105.

**Same: Right to jury trial: Demand: Waiver: Continuance.** A defendant has a right to a jury trial in a superior court if demanded when the case is assigned for trial, otherwise the right is waived, but to constitute a waiver the assignment must be for the present term, in conformity with the statute; so that when a cause not at issue was assigned for a future term failure to demand a jury at the time of the assignment was not a waiver of the right, but a demand at the time set for trial was timely; and if a jury was not summoned for that day a continuance should have been granted until it was in attendance. *Idem.*

**Change of venue.** The ruling denying a change of venue on the ground of prejudice of the trial judge will not be disturbed except upon a showing of an abuse of discretion. *Jordan Co. v. Sperry Brothers*, 225.

**Dismissal of action.** Where the court dismisses a case on its own motion it should make a record of the ground of its action, but although failing to do so a presumption obtains in favor of the ruling, and a reversal will not be ordered unless upon the whole case there is no ground to support it. *Loose v. Cooper*, 377.

**Same: Want of prosecution: Reinstatement.** The court has power to dismiss a cause for want of prosecution independent of any statute; and where a case remained on the docket for five

**PRACTICE Continued**

years after issue was joined and plaintiff and his attorney were in the court room but made no objection to the order of dismissal, the court was justified in refusing a motion for reinstatement. *Idem*.

**Informal or defective verdicts: Correction.** It is proper to recall a jury to correct an informal or defective verdict where the same can be done promptly and without prejudice to the losing party; as where the jury returned both verdicts, one for plaintiff assessing his damages and the other for defendant, a recall and poll of the jury on the same day showed that the return of defendant's verdict was a mistake properly guarded defendant's rights, and his objection to the corrected verdict was rightly overruled. *Cohen v. Traction Co.*, 469.

**Practice in Federal Courts: Application of State statutes: Jurisdiction: Validity of judgment.** Where there is no provision of the federal statute governing the service of notice or subpoena, the statute of the State on the subject where the federal court is held will govern, even in an equity action, if reasonable and adapted to the purpose; and where the federal court has applied the State statute, finding it sufficient to confer jurisdiction, the State courts will not reach a contrary conclusion; so that where the officers of a domestic corporation, residents of another State, absented themselves from the State and provided no place of business therein, and the federal court in a suit to dissolve the corporation and appoint a receiver, in the absence of a federal statute, adopted the State statute as to service of notice on corporations and determined that it had acquired jurisdiction thereby, the judgment in the State court will be given effect and the receiver permitted to sue therein. *Hollister v. Vermont Building Co.*, 160.

**Remand for further proceedings: Admission of additional evidence.** Ordinarily the reversal of an equity action upon trial *de novo* terminates the litigation, the opinion indicating simply the character of the decree to be entered; but in furtherance of justice the appellate court may remand the cause for further proceedings, when, upon the filing of a *procedendo* the cause is before the lower court precisely as when originally submitted; and leave to introduce further evidence, omitted through inadvertence, may, upon proper showing and in the discretion of the court, be granted. *Bank v. Richardson*, 738.

**Same: Reference of cause.** Permission to offer additional evidence after a reversal upon a trial *de novo* in the appellate court is not a matter of absolute right, but of discretion reposed in the

## PRACTICE Continued

TO

## PUBLIC LANDS

trial court, which should only be indulged where the proposed evidence has been discovered since the submission, or acts have occurred pending the proceedings vitally affecting the relief to be granted. In the instant case it was not an abuse of discretion to reopen the case for the purpose of receiving additional evidence to take the place of certain incompetent evidence received upon the original trial; and it is also held that the court properly heard the additional evidence without again referring the case to the referee before whom it was originally heard. *Idem*.

**Same: Amendment of pleadings: Change of position.** Where a cause has been tried *de novo* on appeal and remanded for further proceedings with respect to a particular finding of the trial court, the filing of an amendment changing the claim of the party on another issue, which was determined on the original submission and approved on the appeal is not authorized: as where a complete settlement was pleaded, found by the trial court and approved on appeal, an amendment withdrawing the plea and alleging instead that the settlement did not include all matters of difference. Moreover as no additional evidence was received on the subject it was not permissible as conforming the pleading to the proof, and was too late to conform to the proof originally offered. *Idem*.

- **Same: Findings by court: Construction: Conflict.** Although the findings in an equity action are to be treated as special verdicts, still in ascertaining the intent of each they must be construed with reference to one another; and when so construed it was apparent that certain items of an account, concerning which there was no dispute, were not treated by the court as involved in a claimed settlement there was no conflict, even though one finding standing alone indicated that all rights of the parties to the date of the settlement were disposed of. *Idem*.

**Reopening of case: Review.** The matter of reopening a case for the admission of further testimony is largely discretionary, and the action of the trial court will not as a rule be interfered with unless the other party has not had a fair opportunity to meet the same. *Carr v. Way*, 245.

**PRINCIPAL AND AGENT.** See AGENCY.

## PUBLIC LANDS.

**Grant in aid of railroads: Unsurveyed lands: Effect of resurvey.**

Where an entire government section bordering upon a lake has been granted to the State to aid in the construction of a rail-

## PUBLIC LANDS Continued

TO

## RAILROADS

road, and upon compliance by the railway company with the terms of the grant a patent has issued conveying the section to the State, the government no longer has any legal or equitable title therein; and if by mistake some small part of the subdivision was left unsurveyed its subsequent survey by direction of the Interior Department will not effect a restoration of the same to the public domain, but any apparent title thereto either in the government or State is held in trust for the benefit of the railway company and its grantees. Where, however, the meander line, which is not ordinarily a boundary, is established so far from the shore line as to indicate gross error or fraud and the government has done nothing to part with its title to the unsurveyed land, it may cause a resurvey of the same and dispose of it as government land. In the instant case the unsurveyed land is held to be part of the original grant. *Barringer v. Davis*, 419.

**PURE FOOD.**

**Labeling packages.** A dealer commits no offense against the pure food statutes, relating to labeling packages to show their constituents, by taking small amounts from an ordinary commercial package properly labeled and selling the same to customers without further labeling the same. *State v. Neslund*, 461.

**QUIETING TITLE.** See **EQUITY.**

**RAFFLING.** See **REFLEVIN.**

**RAILROADS.**

**Carriers of passengers: Degree of care.** A carrier of passengers is bound to exercise the highest degree of care reasonably consistent with the practicable conduct of its business. *Johnston v. Ry.*, 114.

**Passengers: Negligence.** The relation of passenger is not severed by temporarily alighting at a passenger station, while the train is waiting, for the purpose of exercise upon the station platform, and if the train is started without reasonable warning and opportunity to reenter the car, the carrier is negligent in performing its contract of transportation, and is liable for the natural consequences of such negligence, unless the passenger has contributed to his injury. *Gannon v. Railway Co.*, 37.

**Same: Contributory negligence.** It is not conclusively negligence to attempt to board a moving train, when done with the

## RAILROADS Continued

approval and assistance of an employee authorized to act with reference to the transportation of passengers on the train; and a porter of a pullman car is such an employee. *Idem.*

**Contributory negligence.** Where the speed of the train when plaintiff attempted with the assistance of the porter to board it was not shown, and the evidence was not conclusive of his negligence in holding to the car after losing his footing, and that he was aware of his danger, his contributory negligence was not conclusively shown, and a directed verdict for defendant should not have been entered. *Idem.*

**Crossing accident: Failure to give signals: Instruction.** Where the plaintiffs claim of negligence, in an action for the value of cattle killed at a railway crossing, was that defendant operated its train over a particular highway at an unlawful speed and without giving the statutory signals, an instruction allowing recovery for failure to give the statutory signals at other crossings was erroneous, because the only claim of negligence in that regard has reference to the crossing where the accident occurred; and for the further reason that by the language of the statute the inquiry is limited to a failure to give the signals for the particular crossing as to which complaint is made. *Heise v. Ry. Co.*, 88.

**Same: Contributory negligence: Evidence.** It is competent to show whether signals were given at preceding crossings, which were or might have been heard by the person in charge of cattle killed at a particular crossing in time to have avoided the accident, as bearing on the care of the person in charge of the cattle killed by reason of the alleged failure to give the signals; but when received for that purpose it will not be presumed on appeal that the other party consented to its consideration on an issue not presented by the pleadings. *Idem.*

**Injury to employee: Negligence: Submission of issues.** Where there was no evidence of any defects in a railway engine causing it to move without an application of steam, or that the company had reason to apprehend such an occurrence, and nothing to charge operators of the engine with knowledge of such defects, an instruction authorizing recovery for injury to an employee caused by its unexpected movement, while cleaning clinkers from the firebox, should not have been given. *Douda v. Ry. Co.*, 82.

**Same: Negligence: Evidence.** The movement of a railway engine without an application of steam by the engineer is so improbable



## RAILROADS Continued

that the fact of its movement is some evidence that the person in charge was responsible therefor; and, taken in connection with the testimony of one injured thereby that the engineer at the time acknowledged adjusting the lever, which was competent as part of the *res gestae*, was sufficient to take the issue of negligence in that respect to the jury, although the engineer gave a different version of the conversation. *Idem*.

**Same: Last fair chance.** Where there was no evidence that the engineer might have avoided the injury by exercise of diligence after discovering plaintiff's peril, the result of his contributory negligence, the issue involving the doctrine of the last fair chance ought to have been submitted. *Idem*.

**Same: Settlement: Fraud: Evidence.** Under a plea that an employee's settlement of a claim for personal injury was procured by fraud, evidence that he and the members of his family present at the trial were unable to read English was admissible, to show that the employee did not know the contents of the release and that the same was misrepresented to him. *Idem*.

**Same.** The statement of a claim agent in making settlement with an injured employee that he understood from the employee's physician that he would recover within a specified time is merely an expression of opinion, and will not justify setting aside the settlement on the ground of fraud; especially where the employee had the advice of his own physician and it did not appear that he relied upon the agent's statement. *Idem*.

**Shipment of live stock: Delay: Damages: Evidence: Instructions.** Instructions must be read with respect to the testimony and not with reference to an abstract proposition. In the instant case, involving a claim of damages for delay in the shipment of stock, the evidence showed that delivery to the connecting carrier could only be effected by presentation of the bill of lading, and that the same was presented to a transfer company recognized as the agent of the connecting line, which unloaded, watered and fed the stock, a customary duty of the initial company, causing delay in shipment. No negligence was charged against the connecting carrier but the case turned on the sufficiency of the evidence to show proper and timely delivery to the transfer company. *Held*, that instructions charging that to constitute delivery the stock must have passed to the control of the connecting line and that so long as any act remained to be performed by the initial carrier there was not a complete delivery, and that the court assumed that the initial company could

## RAILROADS Continued

not escape liability without showing timely delivery to the connecting line, and overlooked the fact that it was not responsible for the acts of the transfer company, were not prejudicial but fairly presented defendants case as disclosed by the evidence. *Wisecarver v. Ry. Co.*, 121.

**Same: Duty to feed and water stock.** In the absence of a custom it is the duty of the carrier of live stock last receiving the same for through shipment during the twenty-eight hour period, to feed and water the same as required by the statute; but where it has become the established custom for the initial carrier to perform this duty before delivering the stock to the connecting line, it is chargeable with any damages, the result of delay, by neglect or failure to do so. *Idem*.

**Same: Contract limitation of carriers liability.** A contract for the shipment of live stock which provides that the same is not to be transported or delivered at the destination within any specified time, nor in time for any market; that the shipper shall assume the risk of care and the expense of feeding and watering at all times and places; and shall load and unload the same at his own expense is invalid, and will not relieve the carrier from damages for negligent delay in shipment. *Idem*.

**Same: Liability for injury.** A carrier of live stock whose negligent delay in transportation causes or contributes to injury of the stock, even though this does not develop until after it has delivered the same to a connecting carrier, is liable for the injury. *Idem*.

**Same: Damages: Instruction.** A carrier of live stock is liable for all damages which naturally and proximately result from its failure to perform its duty, whether apprehended by it or not. *Idem*.

**Street railways: Paving: Assessment: Conclusiveness.** Where a city council simply undertakes to determine the value of paving that portion of a street which is chargeable to a street car company, for the benefit of abutting owners, under Code section 835, its determination, though unappealed from, is not conclusive of the company's liability therefor. *Oskaloosa v. Traction & Light Co.*, 236.

**Same: Recovery from street car company.** Where a street car company lays its tracks along a paved street it can only be required, under the provision of Code, section 835, to pay to the city for the benefit of abutting owners the value of that

## RAILROADS Continued

portion of the paving between and adjacent to its tracks, which has been apportioned among abutting owners and to whom compensation has been directed to be made; it can not be compelled to pay the value of such improvement either to an old street car company whose rights have been completely forfeited, nor to the city claiming in its own right because of the fact that the street abuts upon a public square. *Idem.*

**Street railways: Collision: Negligence.** The fact that a street car was being operated at an unlawful rate of speed at the time of injury to a pedestrian from collision is enough to take the issue of negligence to the jury. In *re Estate of Kern*, 620.

**Opinion evidence: Speed of cars.** A witness who has shown some knowledge as to the speed of a street car may testify on the subject, although not an expert. *Idem.*

**Evidence: *res gestae*.** Statements of the motorman of a street car regarding an accident and made immediately thereafter are admissible as part of the *res gestae*, regardless of the purpose in offering the same; and an erroneous ruling in excluding the same will be presumed to have been prejudicial, unless, as is ordinarily required, the successful party shows otherwise. *Idem.*

**Description of injuries.** Where there was doubt as to how and where a deceased was struck by a street car and his position when he was struck, a physician should have been permitted to give the nature and a description of his injuries in aid of a solution of these questions, even though the accident and resulting death were admitted. *Idem.*

**Same.** Where the issues in an action for the death of one injured in a street car accident involved a liability under the doctrine of the last fair chance, and also the question of decedent's negligence, exclusion of the motorman's statements concerning and immediately following the accident was erroneous, as well as refusal to permit the physician to describe the nature and character of the injuries; as the evidence might have had a bearing upon either or both such issues. *Idem.*

**Contributory negligence: Evidence.** Evidence held insufficient to show as a matter of law that deceased was guilty of contributory negligence in attempting to cross the street car track for the purpose of boarding an approaching car. *Idem.*

**Presumption as to speed.** A pedestrian having observed the approach of a street car may rely on the presumption that it is

## RAILROADS Continued

not traveling at a greater rate of speed than is permitted by the city ordinance. *Idem.*

**Negligence: Estoppel.** A street car company can not, through a violation of rules made for the benefit of the public, place one rightfully on the street in a perilous position and then to avoid liability for injury to him while in that position be heard to say that he did not use ordinary prudence for his own safety. *Idem.*

**Contributory negligence.** A pedestrian who has observed the approach of a street car is not as a matter of law bound to look a second time, but having located the same he may rely on the assumption that it will be run at the usual speed. *Idem.*

**Same.** Where a street car company negligently throws a pedestrian off his guard and puts him in peril, his conduct while in that situation will not under any circumstances be regarded as contributing to his injury. *Idem.*

**Street railways: Right of public.** The relation of a street car company to the traveling public is not affected by the fact that it owns the fee to its right of way, where its patronage is dependent upon its relation to the street and it maintains a platform partly in the street for the accommodation of the traveling public. *McDivitt v. Ry. Co.*, 689.

**Same: Negligence.** The crossing of a street car track in front of an approaching car is not *per se* a negligent act; the question of negligence in such cases depends upon the particular circumstances, as the distance from the approaching car and its speed. *Idem.*

**Same: When a fact question.** Where there is evidence tending to show that at the time a pedestrian attempted to cross a street car track in front of an approaching car, he had reason to believe he could cross in safety, but his failure to do so was the result of excessive speed of the car, reasonable minds might differ on the question of his negligence and a fact question is presented. *Idem.*

**Same: Contributory negligence: Evidence.** The question of whether decedent, killed in a collision with a street car while attempting to cross the track, was guilty of contributory negligence is held under the evidence to have been for the jury. *Idem.*

## RAILROADS Continued

TO

## REAL PROPERTY

**Street railways: Injury to passenger: Negligence: Evidence.**

Where the evidence concerning a street car accident, though conflicting, warranted a finding that plaintiff gave a stop signal which was recognized by the conductor and a purpose to stop the car was manifest, and with knowledge of this fact plaintiff with ordinary care was in the act of alighting, when by a sudden jerk of the car he lost his footing and was dragged some distance before the car came to a stop, a verdict of negligence on the part of the company should not be disturbed. *Cohen v. Traction Co.*, 469.

**Same: Instruction.** Where the evidence tended to show that it was the usual custom for street cars to stop at street intersections only, so that the conductor might have understood a stop signal as indicating a desire to alight at the next street rather than at an intermediate point, the jury should have been instructed that defendant was not bound to anticipate that plaintiff would leave the car elsewhere than at the usual stopping place. *Idem*.

**Same: Negligence.** Where a street car passenger indicates to the conductor a desire to leave the car at a place other than the usual stopping place and the conductor understanding the request assents thereto, and the car having stopped or slowed down so that the passenger may with reasonable prudence attempt to alight but is injured in so doing by a sudden jerk of the car, the company is liable for negligence. *Idem*.

**RAPE.** See CRIMINAL LAW.

**REAL PROPERTY.** See JUDGMENTS.**Boundaries: Meandered lakes: Excess land: Title: Estoppel.**

Where the original government survey coincides with the shore of a lake and terminates at meander posts on the lake shore, which is marked as the boundary, the shore and not the meander line constitutes the boundary and a conveyance with reference to such survey by the patentee of the government subdivision, to which it had held the title for a long series of years without questioning the survey, carries the title to the shore of the lake, and the title to the land beyond the meander line can not thereafter be questioned, in the absence of any showing of an intention to reserve the same, or of knowledge of the discrepancy between the survey and the actual acreage, or that the grantor was misled as to the true situation. *Bar-ringer v. Davis*, 419.

## REAL PROPERTY Continued

**Same: Resurvey of patented land: Jurisdiction.** Where the government has parted with its title to lands and a controversy arises between persons asserting conflicting claims under grants or patents based upon an official survey, such survey is conclusive though grossly incorrect, and the land department has no jurisdiction to affect the rights of the parties by a resurvey and issuance of a new patent. *Idem.*

**Boundaries: Establishment by agreement: Estoppel: Notice to third parties.** Where a conveyance of part of grantor's realty by metes and bounds refers to no natural or artificial objects by which the description may be applied, it is competent for the parties to agree upon a division line, and when such agreement has been executed, followed by possession and improvements by the grantee in reliance thereon, it becomes conclusive on the parties; and where such line is marked by plain artificial monuments, up to which the vendee is in possession, the grantees of the adjoining land are bound to take notice of his rights. *Seberg v. Bank*, 99.

**Same: Location of street line.** Where a lot owner erected a building on the street line where it has stood for a long series of years, and during all of the time the street had been used and improved with respect to it, a location of the line was thus effected with such definiteness that it will prevail against a survey made by one who could not determine with accuracy the original lot lines. *Idem.*

**Boundaries: Adverse possession.** Mere possession by a lot owner of adjacent land with no intention of asserting title beyond the true boundary does not constitute such adverse possession as will ripen into title. *Webster v. Shrine Temple Co.*, 325.

**Same: Acquiescence: Burden of proof.** A boundary line may be established by acquiescence, but where the claimed line differs from the true boundary the burden is upon the one asserting the claim of acquiescence to show that the same has been recognized by both parties as the true line for the statutory period. Evidence held insufficient to show acquiescence. *Idem.*

**Contract of sale: Forfeiture: Tender: Waiver.** Where the vendor of property under a contract providing for forfeiture for nonpayment served notice of forfeiture, and upon tender within the statutory period of the amount believed by the purchaser to be due on the contract made no objection to the amount, but insisted upon the forfeiture and refused the sum offered, there was a waiver of the right to further object to the amount tendered. *Nolan v. Foley*, 671.

**REAL PROPERTY Continued**

**Same: Rents and profits: Accounting.** Where the vendor of property has lost the right to forfeit the contract, but wrongfully insisting thereon goes into possession, but he must account to the purchaser for the rents and profits; and the court should determine the amount due under the contract, order payment thereof within a specified time, or in default of payment order foreclosure of the purchaser's interest. *Idem.*

**Oral contract to convey: Evidence.** To justify a decree settling the title to real property in pursuance of an oral promise the evidence must be clear, definite and conclusive; and this is specially true where the circumstance of taking possession and making improvements is lacking. *Boeck v. Milke, 713.*

**Same: Declarations of a decedent.** Conceding that declarations of a decedent may be shown in aid of an oral promise to give another his land, still where the same are chiefly as to such an intention merely they are not very material evidence of a definite and specific contract to do so, and when made many years previously are of little weight. *Idem.*

**Same: Evidence.** Evidence reviewed and held insufficient to establish a claimed oral contract of decedent to give plaintiff his land in consideration that he live with decedent the remainder of his life. *Idem.*

**Dower: Action to establish same: Beneficial interest of husband: Evidence.** In an action by the widow to establish her dower interest in lands conveyed by her husband alone, it is competent to show by parol that the husband had no beneficial interest in the property, and that he simply reconveyed the same to his grantor or some one designated by him; and the act of the husband in reconveying under such circumstances is not a fraud upon the wife which she can urge in support of her claim of a dower interest in the property. Evidence held to show that the husband never had any real interest in the land which was subject to the wife's dower. *Johnston v. Jickling, 444.*

**Easements: Implied grant.** On the conveyance of one of two adjoining lots, upon the boundary line between which a driveway has been constructed for the accommodation of both, by one in whom there was an unity of title and possession, there is an implied grant of the right to use the driveway as an easement appurtenant to the lot conveyed. *Teachout v. Duffus, 466.*

## REAL PROPERTY Continued

**Eminent domain: Condemnation of right of way: Notice.** The owner of adjacent tracts of land over which a railway has been located may describe the same as an entirety in his application for the appointment of a sheriff's jury to assess the damages, and in the notice served upon the railway company; and when the location of the right of way is not specified in the notice and return of the appraisers, otherwise than as upon and across the land, the proceedings should not be construed as a demand for damages for a portion of the right of way which it had been determined on appeal that he did not own, and his application on that ground should not be dismissed. *Hall v. Ry. Co.*, 250.

**Same: Assessment of damages.** Where it was a matter of record that the plaintiff in condemnation proceedings never acquired the ground from which the right of way was taken over one of two tracts described in the proceeding, it will be presumed in estimating the damages to his farm that the jury took into consideration only the damage to the other tract, but if this were not true the error could be corrected on appeal to the district court. *Idem.*

**Same.** The issues in condemnation proceedings are the same on appeal as before the sheriff's jury, though the estimate of damages is to be made without reference to the award appealed from. *Idem.*

**Recovery of possession: Equitable action.** Where one is in possession of leased premises claiming the right thereto by virtue of having purchased the rough feed on the place, and, by assignment of the lease, the rightfulness of his possession can not be determined in an equitable action, as there is a plain, speedy and adequate remedy at law. *Doige v. Bruce*, 210.

**Rescission: Evidence.** In an action to recover the consideration paid for land in personal services, upon rescission of the contract because of failure of title, evidence of the value of the services rendered is admissible. *Oliver v. Kneedler*, 158.

**Options: Manner of exercise: How determined.** The manner of exercising an option is to be gathered from the language of the instrument creating it, aided by competent parol evidence of the intent of the parties. *Breen v. Mayne*, 399.

**Same: Acceptance.** An offer without an acceptance does not constitute a contract, and generally the acceptance must accord with the terms of the offer. *Idem.*

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## REAL PROPERTY Continued

TO

## REPLEVIN

**Same: Exercise of option.** Under a contract agreeing, at the purchaser's option, to sell certain lands at any time before a fixed date at an agreed price payable on delivery of a deed, and with a further provision that if the buyer sold the land within the time the owner would make a deed to the purchaser and furnish an abstract showing perfect title, and would also accept the purchaser's note and mortgage for a deferred payment, it is held that a payment of the purchase price was not essential to completion of the contract, and that the holder of the option could make his election to purchase in any lawful manner within the time limit, and within a reasonable time thereafter tender the purchase price. *Idem.*

**Same: Statute of frauds.** An option contract for the sale of land signed by the party to be charged is not within the statute of frauds, therefore the acceptance of the option need not be in writing. *Idem.*

**Same: Acceptance of option: Evidence.** The acceptance of an option to purchase land must be unqualified and unequivocal and communicated to the party extending it, and must become by the acceptance a mutual binding contract. Evidence held insufficient to show acceptance. *Idem.*

## RECEIVERS.

**Appointment of receiver.** Where it appeared that the judgment defendant was insolvent, that he had attempted a fraudulent transfer of the stock of goods to his father, of which he was in possession, and upon which plaintiff had a lien, and that both he and his father were drawing money from the business, the appointment of a receiver in an action to subject the property to the judgment was proper. *Rankin v. Stultz*, 681.

**REFERENCE OF CAUSES.** See PRACTICE.

**REFORMATION OF INSTRUMENTS.** See EQUITY

## REPLEVIN.

**Pleading: Evidence.** In an action for the recovery of personalty where the issue is simply as to whether defendant agreed to hold the property as plaintiff's bailee, the plaintiff may prove without pleading the fact that a stipulation in the receipt given for the property is not binding upon him, because inserted without his knowledge and contrary to the oral agreement. *Dee v. Automobile Co.*, 610.

REPLEVIN Continued

TO

SALES

**Same: Raffle: Transfer of title: Estoppel.** Where the owner of an automobile disposed of the same by means of a raffle and made no attempt to rescind, but gave the successful party an order for the machine on those in actual possession of the same, there was an effectual transfer of title as between the owner and such successful party; and the parties in possession were in no position to question the legality of plaintiff's title, because acquired through a raffle, especially after recognizing the order and agreeing to hold the same for the transferee. *Idem*.

**RENTS AND PROFITS.** See REAL PROPERTY.

**RESCISSION.** See EQUITY—PARTNERSHIP—REAL PROPERTY.

## SALES.

**Conditional sale: Forfeiture: Waiver: Equitable jurisdiction.**

Although a contract for the sale of personal property reserving title in the seller until the purchase price was fully paid authorized a forfeiture in case of default in payment, such right of forfeiture was not the exclusive remedy but could be waived, and a suit in equity brought to enforce the claim as a lien against the property: as where there was a dispute as to the balance due and the seller waived his right to forfeit the contract, asked to have the amount due ascertained and that he retain his lien on the property therefor, his cause was triable in equity and a motion to transfer to the law docket was properly overruled. *Gigray v. Mumper*, 396.

**Failure of consideration: Evidence.** Evidence in an action for the price of stock food that the defendant sold the first shipment which was all right but that his customers refused to buy the second on the ground that it was worthless, and that defendant used some and found it worthless, was not sufficient to support a plea of failure of consideration. *Acme Food Co. v. Howerton*, 265.

**Warranty: Instruction.** An instruction that any positive statement of fact and not of opinion as to the quality or condition of the thing sold, which naturally and fairly shows that the seller intended to bind himself to its truth and the buyer so understood and relied upon the statement, constitutes a warranty, and is not open to the objection that it makes the existence of the warranty depend upon the sellers intention to bind himself to the truth of the statement. *Barnes v. Love*, 263.

**Same.** Where the courts instructions in a breach of warranty suit in the sale of a horse, were all on the theory that if the

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animal was affected at the time of the sale with "moon blindness" she was unsound within the terms of the claimed warranty, and no other unsoundness was referred to in the evidence, a further instruction that disease of the eyes would constitute unsoundness was not necessary. *Idem.*

**SECURITY FOR COSTS.** See COSTS.

## SCHOOLS.

**School districts: School house tax: Certification.** When the electors of a school district have voted a tax at the annual meeting for school house purposes, it becomes the duty of the secretary of the board to certify the same to the supervisors within the time and as required by Code, section 2767, regardless of any action of the board, unless the vote is rescinded by a subsequent vote of the electors. *Kirchner v. Board of Directors*, 43.

**Same: Levy of school house tax.** The fact that the electors at their annual meeting voted a school house tax in excess of that which can legally be levied in any one year does not render the action of the electors void, but the supervisors should make the legal levy notwithstanding the excessive amount voted. *Idem.*

**Special school meetings: Duty of board: Discretion: Mandamus.** A board of school directors may call a special meeting of the electors when petitioned, to vote upon the question of rescinding a former vote authorizing a school house tax, but the statute makes the matter discretionary with the board and the court will not require it to act. *Idem.*

**Same.** After taxes levied for school purposes in accordance with a vote of the electors of the district have become due, and a part or all have been paid, an action to require the board to call a special meeting to vote upon the question of rescinding the former vote will not lie. *Idem.*

**School tax: Certification.** The certificate of a school clerk to the supervisors certifying that a tax was voted by the electors upon the taxable property of the district is not void, because indicating an attempt to levy a tax on the property belonging to the district itself. *Idem.*

## SLANDER AND LIBEL.

**Slander per se.** If used in a defamatory sense the statement that plaintiff, a married woman, was too intimate with the

SLANDER AND LIBEL Continued TO SURETYSHIP

hired man is slanderous *per se*, although the word "intimate" is capable of use in an innocent sense. *Arnold v. Lutz*, 596.

**Same: Evidence: Instruction.** Persons to whom alleged slanderous words were spoken may testify as to the sense in which they understood the words to be used; and the jury is to determine whether the words were used in a defamatory sense. *Idem*.

**STATUTES.** See COURTS—PRACTICE—PURE FOOD.

**STATUTE OF FRAUDS.** See NEGOTIABLE INSTRUMENTS—REAL PROPERTY.

**STREET RAILWAYS.** See RAILWAYS.

**SUPERSEDEAS BOND.** See SURETYSHIP.

## SURETYSHIP.

**Contribution: New bond: Primary liability.** While the giving of a new executor's bond does not ordinarily of itself release the old one, but the sureties thereon are treated as co-sureties and are liable to each other for contribution in proportion to their respective liability, still a new bond may be given under such circumstances that the sureties thereon undertake a primary liability: as where the surety on the original bond was the husband of the testatrix who died and his estate was about to be settled and distributed, and the obligees as beneficiaries of the husband's estate were thus in effect sureties for themselves as beneficiaries of their mother's estate, the new bond being given under an order of court directing its filing and a discharge of the sureties on the old one to which no exception was taken, the obligation of the new surety became the primary and only liability as such. *Bankers Surety Co. v. Wyman*, 574.

**Same: New bond: Application for.** Where an estate is pending and unsettled and the executor is required by an order of court to give a new bond because of the death of the surety on the old bond, it is not material to the proceeding that the heirs appear and make application therefor. *Idem*.

**Same: Discharge of old bond.** The giving of a new executor's bond in compliance with an order of court is an assent to the further provision of the order discharging the old one upon filing the new one. *Idem*.

**Same: Notice.** The surety on an executor's bond given in conformity with an order of court is required to take notice of matters contained in the order. *Idem*.

## SURETYSHIP Continued

**Contribution: Laches.** The surety on an executor's bond must guard his own right to contribution from prior sureties, as this duty does not devolve upon the beneficiaries of the estate; and where he neglects to do so he will lose any right he may have had by laches. *Idem.*

**Supersedeas bond: Enforcement of judgment: Injunction.** Upon the rendition of a judgment against an executor the surety on his official bond agreed to indemnify another surety on his *supersedeas* bond given to perfect the appeal, in which the *supersedeas* surety agreed to perform the judgment of the supreme court. *Held*, that the liability of the *supersedeas* surety was primary and operated to the benefit of the surety on the executor's bond; and the judgment having been affirmed the surety on the executor's bond had no such interest in the matter as would authorize it to enjoin the collection of the judgment from the *supersedeas* surety. *Idem.*

**Substitution: Contribution.** Where the surety on an executor's substituted bond gave an indemnifying bond to secure the executor's surety on a *supersedeas* bond, such indemnifying bond was not binding on the estate of the first surety even if the estate was liable to the substituted surety for contribution. *Idem.*

**Same.** Contribution between sureties is not dependent upon privity or knowledge, and the sureties need not be parties to the same instrument; but it is essential that they be bound by the same principal and for the performance of the same duty. *Idem.*

**Indemnity: Extinguishment.** No change in the form of indebtedness originally secured by mortgage will operate to release the mortgage so long as the identity of the debt can be traced; so that where plaintiff became surety for defendant's debt, taking a mortgage to indemnify himself against loss, payment by defendant of his debt with money borrowed from another source with plaintiff as surety, did not operate to terminate the suretyship and extinguish the mortgage. *Gribben v. Clement*, 144.

**Same: Action of surety: When not prematurely brought: Limitations.** Where the surety on a note to a bank, to whom the debtor had given a note and mortgage as indemnity, had an account to his credit in the bank for more than the amount of the debtors obligation, and he agreed with the cashier that the sum due from the debtor which had matured should be charged to his account, his action against the debtor on his indemnity paper was not prematurely brought, although he did not formally

**SURETYSHIP Continued**

pay the same until after suit was commenced; and, even if prematurely brought its actual payment before trial would entitle the surety to maintain the action on the filing of a supplemental petition showing that fact; nor was the action by the surety barred because payment to him of the debtor's obligation was not pleaded within ten years from maturity of his indemnifying note and mortgage. *Idem.*

**TAXATION.** See **SCHOOLS.****Erroneous sale: Official record of same: Rights of owner.**

Where a tax payer has paid the taxes demanded of him but the treasurer gave him a receipt covering an incorrect description by omitting a portion of the premises, and after sale but before time for redemption expired he discovered the error and made a notation on the tax record of the fact that the sale was erroneous, as authorized by statute, the owner can rely on the record so made; and the treasurer has no authority to erase the entry and issue a deed to the purchaser without notice to the owner and an opportunity given for him to protect his rights. *Burchardt v. Scofield*, 336.

**Same: Negligence: Equitable relief.** A tax payer is not to be charged with negligence simply because he relies upon information given him by a county treasurer respecting the taxes he is required to pay, and if, having made timely effort to pay the same or to redeem from a sale, he is misled by the conduct or mistake of the officer a court of equity will grant him relief. *Idem.*

**Redemption: Proof of service of notice: Duty of treasurer.**

Upon the return of service of notice of the expiration of the period of redemption from a tax sale, it becomes the mandatory duty of the treasurer to forthwith report the same in writing to the auditor, that he may know the exact time when the right of redemption expires; and until this is done he may rightfully receive redemption from those entitled to redeem, and especially those who have not been served with notice in due time. *Ashenfelter v. Seiling*, 512.

**Same: Proof of service of notice: Presumption.** The filing of proof of service of a redemption notice with the treasurer is only presumptive evidence of completed service, and where there has been a material omission of any required step by which the right of redemption may be cut off this presumption is overcome; as where the treasurer neglects to file proof of service of notice with the auditor as required by statute. *Idem.*

## SURETYSHIP Continued

TO

## TRACTION ENGINES

**Same: Construction of statutes.** The right of redemption from a tax sale will be liberally construed in favor of the tax payer. *Idem.*

**Same: Service of notice of redemption: Proof of service.** The affidavit of service of a redemption notice must show at whose direction the service was made, and the notice must be served upon the party in possession to support a tax deed. *Idem.*

**Refund of taxes: Interest: Mandamus.** The statute directing the supervisors to order the refund of taxes erroneously or illegally exacted or paid, does not provide that the county shall pay interest on the money refunded, and *mandamus* will not lie to compel its payment. *Home Savings Bank v. Morris*, 560.

**Same: Statutory action: Recovery.** A tax payer who brings his action in reliance upon the statute to recover interest on taxes wrongfully exacted can not recover independently of the statute. *Idem.*

**Refunding taxes: Statute: Estoppel.** A taxpayer who has invoked the provisions of the statute for the purpose of compelling a refund of taxes wrongfully exacted is precluded from contending that the statute is unconstitutional, because failing to provide for interest on the money refunded. *Idem.*

## TELEGRAPHS AND TELEPHONES.

**Telegraphs: Death message: Nondelivery: Recovery for mental suffering.** Relation by affinity, only, will not raise a presumption of such cordial intimacy between the deceased and the addressee in a death message, as will support a recovery for mental suffering for its nondelivery, but the intimate relations of the parties must be shown; it is not necessary however that the company should know of their special relations at the time of sending the message. *Forenan v. Telegraph Co.*, 32.

**Same.** A son may recover damages for mental anguish by reason of the nondelivery of a message to his father announcing the death of his wife, thus causing the father's failure to attend the funeral; and it is not necessary to the recovery that the telegraph company had notice that it would cause him mental anguish if his father were not present. *Idem.*

**TENDER.** See REAL PROPERTY.

**TRACTION ENGINES.** See HIGHWAYS.

TRUSTS

TO

WILLS

**TRUSTS.** See HOMESTEADS.

**Statutes: Evidence.** Both the statute of frauds and Code section 2918, requiring that declarations of trust must be executed as deeds of conveyance, relate to the character of evidence and do not declare a parol trust in lands invalid; so that where the trustee admits the trust, or where a parol trust has been fully executed they have no application. *Johnston v. Jickling*, 444.

**VENDORS.** See JUDGMENTS—REAL PROPERTY.

**WAIVER.** See REAL PROPERTY—SALES.

**WARRANTY.** See SALES.

**WASTE.** See LANDLORD AND TENANT.

**WATERS.** See DRAINAGE.

**WILLS.**

**Charitable bequest: Uncertainty.** A bequest for charitable purposes will be given effect if it can be done consistently with established rules. The will in question bequeathed a certain sum to a particular Presbyterian Church of which the testator was a member, and by a further provision gave to home and foreign missions a sum to be equally divided. The church was a part of the national organization, with a board of home missions and a board of foreign missions, to which the church contributed to assist them in carrying on their charitable enterprises. *Held*, that the testator intended the bequest for the boards of the home and foreign missions and was not void for uncertainty. In re Estate of Johnston, 109.

**Construction: Estate devised: Power of sale.** A will devising to the wife of testator all his property "to be used by her and enjoyed as she may choose during her natural life, and at her death if any property is remaining to be divided equally among my children," does not pass to the widow a fee simple title to the real property; although her power of sale is such as to cut off the interest of the children therein. *Paxton v. Paxton*, 96.

**Construction: Interest as part of legacy.** The intention of a testator as gathered from the provisions of his will when considered together will govern in its construction; so that while as a general rule interest on legacies does not commence to run until after or at the death of testator, still where the testator



**WILLS Continued**

has clearly provided that a specific legacy should be increased by interest on the sum from a certain date prior to his death, the general rule does not apply. In re Estate of Duncanson, 564.

**Same.** In the instant case the will provided that certain legacies should be increased by interest from a certain date prior to testator's death, and by other provisions that the legacies should be paid from the proceeds of certain lands to be sold by a devisee to whom they were given subject to the legacies, or who should pay interest from such date, but none of the legacies were to be paid until the youngest legatee had reached his majority. *Held*, that while the provisions relating to the sale of the land were uncertain as to payment of interest, still it would not overcome the direct provision for payment thereof from the specified date. *Idem*.

**Contest: Appeal: Service of notice on co-parties.** Co-parties not joining in an appeal must be served with notice thereof, unless it is made to appear that such parties can not be prejudicially affected by a reversal; so that an appeal from a judgment setting aside a will taken by part of defendants will be dismissed for failure to serve with notice those not appealing, where it appears that those not served would take more as heirs than they would under the will; and the court will not speculate as to the possibilities by which it might be to the interest of such co-parties to sustain the will. In re Will of Dows, 268.

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